

EXHIBIT 23

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 - - - - - x
4 SECURITIES INVESTOR PROTECTION
5 CORPORATION
6 v. CASE NO. 08-01789-smb
7 BERNARD L. MADOFF INVESTMENT
8 SECURITIES, LLC, et al,
9 Debtors.
10 - - - - - x
11 IRVING H. PICARD, TRUSTEE FOR THE
12 LIQUIDATION OF BERNARD L. MADOFF,
13 Plaintiff, ADV. PROC.
14 v CASE NO. 10-051430-smb
15 MARILYN BERNFELD TRUST, ET AL.,
16 Defendants.
17 - - - - - x
18 IRVING H. PICARD, TRUSTEE FOR THE
19 LIQUIDATION OF BERNARD L. MADOFF,
20 Plaintiff, Adv. Proceeding
21 v CASE NO. 10-05390-smb
22 1096-1100 RIVER ROAD ASSOCIATION,
23 Defendant.
24 - - - - - x
25

1 - - - - - x

2 IRVING H. PICARD, TRUSTEE FOR THE

3 LIQUIDATION OF BERNARD L. MADOFF,

4 Plaintiff, ADV. PROCEEDING

5 v CASE NO. 10-04283-smb

6 MENDELOW, ET AL.,

7 Defendants.

8 - - - - - x

9 IRVING H. PICARD, TRUSTEE FOR THE

10 LIQUIDATION OF BERNARD L. MADOFF,

11 Plaintiff, ADV. PROCEEDING

12 v CASE NO. 10-05286-smb

13 LEGACY CAPITAL, LTD., ET AL.,

14 Defendants.

15 - - - - - x

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19 October 28, 2015

20 10:02 AM

21 B E F O R E :

22 HON. STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: Unidentified

1 Adversary proceeding: 10-05143-smb Irving H. Picard, Trustee
2 for the Liquidation of Bernard L. Madoff Investment
3 Securities LLC, and Bernard L. Madoff v. Marilyn Bernfeld
4 Trust et al Discovery Conference Pursuant to Local
5 Bankruptcy Rule 7007-1(b) (also applies to Adv. P. Nos. 10-
6 5143 & 10-4841)

7
8 Discovery Conference Pursuant to Local Bankruptcy Rule 7007-
9 1 (b)

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11 Adversary proceeding: 10-04283-smb Picard, as Trustee for
12 the Liquidation of Bernard v. Mendelow et al
13 Discovery Conference pursuant to Local Bankruptcy Local
14 7007-1 (b)

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16 Defendants' Motion for Judgment on the Pleadings

17
18 Adversary proceeding: 10-05286-smb Irving H. Picard, Trustee
19 for the Liquidation of Bernard v. Legacy Capital Ltd. et al
20 Defendant Khronos Motion to Dismiss

21
22 Defendant Legacy Capital's Motion to Dismiss

23

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1 Adversary proceeding: 08-01789-smb Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities, LLC. et al
4 Trustees Motion and Memorandum to Affirm His Determinations
5 Denying Claims of Claimants' Holding Interests in 1973
6 Masters Vacation Fund, Bull Market Fund, and Strattham
7 Partners
8
9 Adversary proceeding: 10-04283-smb Picard, as Trustee for
10 the Liquidation of Bernard v. Mendelow et al
11 Pre-Trial Conference
12
13 Adversary proceeding: 10-05286-smb Irving H. Picard, Trustee
14 for the Liquidation of Bernard L. Madoff Investment
15 Securities LLC, and Bernard L. Madoff v. Legacy Capital Ltd.
16 et al
17 Pre-Trial Conference

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P R O C E E D I N G S

THE COURT: Please be seated. Good morning.

(A chorus of good mornings)

THE COURT: Madoff. Is anyone here from Mr.
Picard's office?

MS. HOCHMUTH: Yes, Your Honor.

Your Honor, would you like to take the first case
of the agenda today? It's actually a group of three --

THE COURT: Which is --

MS. HOCHMUTH: -- cases. It is the Marilyn
Bernfeld Trust, Michael Balimi (ph) and Ellen Bernfeld.

THE COURT: Are they doing -- I think they have a
flat tire. We received a call.

Is anyone here on that case? All right.

MS. HOCHMUTH: We're happy to give counsel time to
arrive, Your Honor.

THE COURT: Good.

MS. HOCHMUTH: I believe the second matter may be
Picard v. River Rose, so since it's also a discovery
conference --

THE COURT: You know what? Let's do the trust --
the seeking affirmation to -- of the trustee's determination
to deny claimants' claim.

(Pause)

THE COURT: Go ahead.

1 MR. KLIDONAS: Good morning, Your Honor. George
2 Klidonas of Baker & Hostetler on behalf of Irving Picard,
3 the trustee for Madoff.

4 Your Honor, we're here this morning on the
5 trustee's motion to affirm the determination of 48 claims
6 relating to 47 docketed objections. The claimants invested
7 indirectly with one of the three general partnerships: 1973
8 Masters Vacation Fund, the Bull Market Fund and Strattham
9 Partners.

10 The objecting claimants invested money in one of
11 these entities which invested in BLMIS. The claimants did
12 not have a financial relationship with BLMIS and did not
13 have ownership over assets and trusts of BLMIS. Thus,
14 denial of these claims is consistent with the 11 prior
15 decisions in this liquidation, including the Second
16 Circuit's decision in Cruz as well as the Morgan Kennedy
17 factors.

18 There was, however, an objection filed by George
19 and Linda Pallis (ph). The basis of their objection is
20 premised solely on one fact that they argue is different
21 from other prior decisions in this liquidation. That fact
22 is that checks from the Pallis's which were sent to the 1973
23 Masters Vacation Fund were made payable to Bernard L. Madoff
24 rather than to the vacation funds.

25 Your Honor, the trustee respectfully submits that

1 there -- that this one fact alone does not change the
2 analysis and, therefore, does not afford the Pallis's
3 customer status.

4 The trustee relies on three sources to support his
5 position. The customer files and the documents submitted to
6 the trustee showing that the vacation fund was, in fact, the
7 customer and not the Pallis's.

8 The second source is discovery responses served on
9 trustee's counsel showing that the Pallis's did not provide
10 sufficient facts to support their burden that they are
11 customers.

12 And the final source is New York general
13 partnership law showing what constitutes partnership
14 property.

15 Just to go deeper into these sources, Your Honor,
16 the customer file and the documents submitted again show
17 that the Pallis's wrote a check made payable to "Bernard L.
18 Madoff," and then sent that check to the authorized agents
19 of the vacation fund. The --

20 THE COURT: Do we know what happened to the check?

21 MR. KLIDONAS: The check was sent to the vacation
22 fund and then that check was forwarded to Madoff for the
23 purposes of crediting the vacation fund's account. The memo
24 line on that check reflects that a credit was to be applied
25 to the vacation fund's BLMIS account. There's no indication

1 in the documents or the customer file showing that the
2 Pallis's believed that the funds were being credited in an
3 account in their name.

4 As the trustee has argued in prior customer
5 decisions, entrusting is the most critical factor. And that
6 factor requires the entrustment of cash or securities to the
7 broker/dealer for the purpose of trading securities.

8 THE COURT: But the argument is that's exactly
9 what this check did.

10 MR. KLIDONAS: That's the argument, Your Honor,
11 but --

12 THE COURT: Why isn't that correct?

13 MR. KLIDONAS: Because the check was entrusted in
14 the hands of the authorized agent or the partnership which
15 was then put into the fund -- the BLMIS -- I'm sorry -- the
16 BLMIS vacation fund account.

17 Furthermore, the Court, in its ERISA decision,
18 more thoroughly explains this standard and says that the
19 party asserting that she was a BLMIS customer must show that
20 she entrusted her own assets directly through an account
21 maintained in her own name rather than indirectly through a
22 fund that then entrusted the fund's assets through an
23 account maintained in the fund's name. And that's at page
24 168 of the ERISA decision.

25 The trustee also relies on the discovery responses

1 provided by the Pallis's. A review of those responses show
2 a number of things.

3 First, they admit that they did not have an
4 account in their name with BLMIS. They did not receive
5 documents from the debtor, including correspondence, tax
6 statements and investment statements. They did not enter
7 into any contracts with the debtor. They admit that their
8 only relationship to BLMIS is by virtue of the fact of their
9 relationship to the vacation fund.

10 Finally, Your Honor, they admit that they lacked
11 control, investment discretion or decision-making authority
12 on behalf of the account.

13 THE COURT: Okay. Thank you.

14 Are the -- anyone representing the Pallis's here?
15 No.

16 All right. The record should reflect there's no
17 response.

18 I'll grant the trustee's motion. The only fact
19 that distinguishes this case from all of the other cases
20 involving investors in the fund which in turn invested in
21 Madoff is you have a check by these individuals made out to
22 Madoff but sent to the agent of the fund. And it just
23 appears that the check was made out to the wrong payee and
24 it was -- the error was rectified by simply crediting the
25 fund for its investment.

1 All the other criteria seen in these other cases
2 exists here. These Pallis's didn't have an account with
3 Madoff -- with BLMIS, had no connection, received no
4 correspondence or direct communications. Their investment
5 was through the fund that, in turn, invested in Madoff.

6 So they fail to demonstrate that they were
7 customers of Madoff and, accordingly, the motion is granted.
8 You can submit an order.

9 MR. KLIDONAS: Thank you, Your Honor.

10 THE COURT: Thank you.

11 Is anyone here on Bernfeld?

12 Okay. How about 1096-1100 River Road?

13 MR. HOCHMUTH: Defense counsel isn't here.

14 THE COURT: Second call.

15 All right. I'll hear the motion to dismiss in
16 Legacy.

17 (Pause)

18 THE COURT: Go ahead.

19 MR. FISHER: Good morning, Your Honor. Eric
20 Fisher from Dickstein Shapiro on behalf of Defendant
21 Khronos, LLC. Also appearing at counsel table is my
22 colleague Lindsay Bush on behalf of Khronos, LLC.

23 THE COURT: How do you do?

24 MR. FISHER: And Nicholas Kajon from Stevens & Lee
25 on behalf of Legacy Capital, Your Honor.

1 Because of the substantial overlap in issues
2 between the two defendants I plan to handle most of the
3 issues and, of course, if Mr. Kajon has anything to add I'm
4 sure he will, Your Honor.

5 THE COURT: Okay. Go ahead.

6 MR. FISHER: And if I may, I would like to hand up
7 a copy of the amended complaint in the event that the Court
8 does not have it handy.

9 THE COURT: Thank you.

10 (Pause)

11 THE COURT: Okay. Go ahead.

12 MR. FISHER: All right. Your Honor, I'll begin
13 with the more straightforward simple argument on behalf of
14 Khronos, LLC only. Khronos, LLC is sued as a subsequent
15 transferee. And it's very easy to take a look at what it is
16 that the complaint says about these subsequent transfers
17 because it's so sparse. All of the allegations that relate
18 to the subsequent transfers, all of the factual allegations
19 are found in paragraphs 147 through 151 of the amended
20 complaint.

21 And, Your Honor, taking a close look at those
22 allegations we submit that it is quite clear that they don't
23 satisfy either the obligation under Rule 8 to identify the
24 transfers by date and amount, the basic vital statistics,
25 what this Court has called the vital statistics of the

1 transfers. And they also -- those allegations also fail to
2 allege facts from which it can plausibly be inferred that
3 the transfers we're talking about here were customer
4 property.

5 And just to provide a quick illustration of this
6 point -- and, again, this is a basis on which Khronos may be
7 dismissed from this case altogether without even getting to
8 the somewhat more involved issues of willful blindness and
9 actual knowledge.

10 Paragraph 147 says a portion of the transfers was
11 subsequently transferred either directly or indirectly to
12 Khronos. It fails to specify --

13 THE COURT: Let me stop you. With respect to the
14 Legacy transfers -- I'll put Montpelier to the side -- the
15 allegations are that Legacy received transfers from BLMIS
16 and Legacy was fully invested in BLMIS. So it's reasonable
17 to infer that any money it subsequently transferred to
18 Khronos originated with BLMIS, right?

19 MR. FISHER: It is not, Your -- those facts are --

20 THE COURT: Why can't I draw that inference on a
21 motion to dismiss?

22 MR. FISHER: One thing that we point out in our
23 motion papers, for example, is the complaint itself alleges
24 that in 2004 a very substantial loan was made by B&P to
25 Legacy against the Legacy assets.

1 THE COURT: I understand that. And maybe they
2 won't be able to trace. But for the purposes of a motion to
3 dismiss where you have a situation where a fund is paying an
4 investment advisor a fee and the fund is fully invested in
5 BLMIS, why isn't it plausible to argue that at least some of
6 the money that was paid by Legacy to Khronos originated with
7 BLMIS. And here there is a specific -- there are specific
8 allegations about how much was paid, during what period and
9 for the purposes of -- I don't know -- you have to --

10 MR. FISHER: Your Honor --

11 THE COURT: In other words, this is not a
12 complaint which simply says, upon information and belief the
13 money was transferred to other people. There's a specific
14 allegation of a specific amount that was transferred by
15 Legacy to Khronos over the period. Why isn't that
16 sufficient?

17 MR. FISHER: Your Honor, I do -- I certainly agree
18 that the transfers from Legacy to Khronos are different from
19 the transfers from Montpelier.

20 THE COURT: They have a different issue with
21 Montpelier. But let's just deal with the transfers from
22 Legacy to Khronos. Why aren't the allegations sufficient?

23 MR. FISHER: So to be clear just about those
24 allegations, the allegation is that \$42,000 annually was
25 transferred to Khronos and paid monthly.

1 THE COURT: Right.

2 MR. FISHER: That information seems to come from
3 the accounting services agreement which is attached to --

4 THE COURT: Right.

5 MR. FISHER: -- the declaration. In other words,
6 it's not an allegation about a transfer. It's an allegation
7 about investment fees that supposedly were owed by Legacy --

8 THE COURT: No. No. No. The allegation --

9 MR. FISHER: -- to Khronos.

10 THE COURT: -- is that Khronos received an annual
11 fee. Now if you're telling me they weren't paid, that's an
12 issue of fact. But I can't decide that on a motion to
13 dismiss. There's an allegation that Legacy paid Khronos
14 \$42,000 plus a one-time payment.

15 MR. FISHER: And, Your Honor, even just the basics
16 of Rule 8, looking at these allegations it's not clear
17 whether we're talking about two years of transfers, six
18 years of transfers. The paragraph 150 which is the only
19 paragraph that talks about the transfers Your Honor is
20 asking about --

21 THE COURT: But it doesn't matter. It's a
22 subsequent transfer. It -- if Legacy is liable for the six
23 year transfers, then you're liable for the six year
24 transfers. Here it says -- I guess it's -- I understand
25 what you're saying. But, I mean, what more do you need but

1 an allegation that the money was transferred and a plausible
2 inference that the money came from BLMIS.

3 MR. FISHER: Well, Your Honor, the paragraph just
4 doesn't --

5 THE COURT: All right.

6 MR. FISHER: It's hard to make sense of it. It
7 goes on to say, as of the end of 2004 Khronos received fees
8 from Legacy Capital totaling \$154,690. What is that number?
9 It's not divisible by 42,000. There --

10 THE COURT: Why don't you move on to your other --

11 MR. FISHER: -- are no dates and amounts.

12 THE COURT: Why don't you move on to your other
13 arguments, Mr. Fisher?

14 MR. FISHER: Okay. Your Honor, I'm going to move
15 on to the willful blindness and actual knowledge issues in
16 the case. And as I said, those issues apply both to Khronos
17 and to Legacy Capital.

18 And just by way of context to explain how those
19 issues fit into this case, the law as it applies in these
20 Madoff cases has now become at least substantially more
21 settled. And it is clear that it is the trustee's burden to
22 plead these issues. And it is also now clear that in order
23 for the trustee to get around the 546(e) safe harbor, the
24 trustee has to plead facts that give rise to a plausible
25 inference of actual knowledge. And in order for the trustee

1 to state a claim it is the trustee's burden to plead willful
2 blindness or lack of good faith. And --

3 THE COURT: Well, that's kind of for a different
4 reason to undercut a good faith argument.

5 MR. FISHER: My point simply being that willful
6 blindness is also part of the trustee's burden and it does
7 not factor into 546(e). It factors here -- with regard to
8 Legacy it's a 548(c) issue. And with regard to Khronos as a
9 subsequent transferee it's a 550 issue. And with regard to
10 Khronos as subsequent transferee, if the trustee has failed
11 to plead lack of good faith it's an absolute -- it's a total
12 defense.

13 THE COURT: Tell me why the complain doesn't plead
14 actual knowledge.

15 MR. FISHER: So, Your Honor, if these standards
16 exist on some kind of continuum and the standard when we're
17 not talking about a SIPA case is inquiry notice, a
18 negligence type standard. And then you move to willful
19 blindness and then even just beyond on that you have actual
20 knowledge.

21 THE COURT: Just tell me why the complaint doesn't
22 plead actual knowledge. That's it.

23 MR. FISHER: Your Honor, the --

24 THE COURT: I'm familiar with -- I don't mean to
25 cut you off. I'm familiar with the standards.

1 MR. FISHER: The complaint is a due diligence
2 complaint. It is an inquiry notice complaint. Essentially,
3 what is plead are red flags that Khronos allegedly became
4 aware of by virtue of Rafael Mayer (ph) serving on the
5 investment committee of a particular Renaissance fund.

6 The complaint then goes on to tell essentially
7 half of a story --

8 THE COURT: Well, is it just pleading red flags or
9 is it pleading that he at least knew some of those red
10 flags?

11 MR. FISHER: It's -- it pleads, Your Honor, that
12 Mr. Mayer became aware of some of those red flags by virtue
13 of serving on an investment --

14 THE COURT: Right.

15 MR. FISHER: -- committee at Meritach (ph). It
16 makes much, for example, of what it calls the Renaissance
17 proposal, which is also a document that we attached as part
18 of our motion to dismiss.

19 And the Renaissance proposal was grappling with
20 the question of, well, how could it be that Madoff is
21 trading options in the volumes that we think he's trading,
22 and raises all kinds of possibilities. It never -- the
23 Renaissance report itself never raises the possibility that
24 there were no securities transactions going on.

25 THE COURT: You think it raises a suspicion?

1 MR. FISHER: It raises -- no, Your Honor. I think
2 the Renaissance study itself goes on to say essentially
3 there are different possibilities for why this isn't adding
4 up. One possibility is that it must be that Madoff isn't
5 managing \$6 billion. He must be managing much less. There
6 is never anything in that Renaissance report to suggest a
7 concern about a Ponzi scheme.

8 The complaint then goes on to allege that Mr.
9 Mayer became aware of concerns, for example, about options
10 volume; that Legacy then hired Khronos to perform some
11 additional due diligence for them with regard to the Madoff
12 investment. So already, Your Honor, I think that's why this
13 is not a case like Merkin. This is not a willful blindness
14 case. We have an allegation that there was an awareness of
15 red flags and then steps were taken to investigate red
16 flags. So this can't possibly--

17 THE COURT: Why would they have hired Khronos to
18 do that if they didn't have some suspicion that something
19 was going on?

20 MR. FISHER: They -- there's -- there was some
21 suspicion that something was going on.

22 THE COURT: Right.

23 MR. FISHER: I think that it's fair to say that
24 people at Renaissance, and Mr. Mayer was on that committee,
25 were scratching their heads saying, we're not sure how he

1 does what he does. And what came up in the context -- and,
2 again, this is very clear from the documents that the
3 trustee relied on in preparing the complaint and quotes from
4 in preparing the complaint, the context was that Renaissance
5 wanted to try to replicate Madoff's trading strategy, not
6 concerns that there were no securities transactions going
7 on. Words like that were never uttered.

8 So Khronos then -- Khronos is then hired by Legacy
9 to perform some additional due diligence, and the trustee
10 tries to make much of what they did although the complaint
11 actually has -- it sounds like facts. It has the feeling of
12 facts because things are pled with a kind of specificity.
13 But when Your Honor really takes a close look at the
14 allegations, there are no allegations about any subjective
15 belief that anyone at Khronos or Legacy formed with regard
16 to the possibility that there were no securities being
17 traded.

18 And I'll give Your Honor just an example because
19 -- and it's an example because I think it shows how this
20 complaint is designed to obfuscate that issue.

21 If Your Honor looks, for example, at -- beginning
22 at paragraph 66 of the complaint, it's the bottom of page
23 16, Your Honor. And this is just an example of how
24 allegations are being used to make it sound as though there
25 are facts that give rise to an inference, but really there

1 are not.

2 So paragraph 66 says, Legacy's -- Legacy Capital's
3 account statements and trade confirmations demonstrated
4 Madoff was purportedly engaging in a possible option
5 transaction. And then it goes on to say, Legacy Capital's
6 account statements reflect that over 26 percent of the time
7 the options volume of BLMIS reported trade for these
8 accounts exceeded the total number of OEX options.

9 So that is a red flag, right? Then if you turn
10 there's a chart. Okay. This is not Khronos's --

11 THE COURT: Where's the chart?

12 MR. FISHER: On page 17, the next page. There's a
13 chart embedded in the complaint.

14 This is not Khronos's chart. There's no
15 allegation that Khronos prepared this chart on behalf of
16 Legacy. And then in paragraph 67 and 68 it says, take a
17 look at what happened on February 19th. Take a look at what
18 happened on January 17th. There's no allegation that anyone
19 at Khronos or at Legacy was actually aware of those facts,
20 actually took a look at those facts.

21 And the premise of this whole chart is that the
22 options volume is in excess of trading on the Chicago Board
23 of Exchange. But, Your Honor, all of the documents, the
24 Renaissance documents show that part of scratching their
25 heads was saying, well, maybe he's trading away from the

1 exchange in private transactions.

2 So, in other words, there were efforts to try to
3 figure out what was going on. But there are no facts from
4 which it can be inferred which the trustee then tries to do.
5 You know, each section like this concludes like it does in
6 paragraph 71: Based on its review of the trade
7 confirmations and monthly statements defendants knew that
8 BLMIS could not have been engaging in the options trading
9 strategy.

10 Well, essentially, that is the trustee in 2015
11 doing work that any -- it's true. Any sophisticated
12 investor could have done this work back in 2003 and 2004.
13 And it's the trustee saying, well, now that I know that
14 Madoff was a fraud, I look at this and I say to myself, any
15 sophisticated investor who would have done this work would
16 have known that there were no securities being traded or
17 would have known that there were no options being traded.

18 Well, that's what we mean when we say that this is
19 a complaint that is pled by hindsight. And what's being
20 disguised here is that really even though they slap the
21 words, defendants knew, defendants knew as many times as
22 they can all over the complaint, really this is the same
23 complaint that these defendants faced in 2010 which was
24 under the old inquiry notice standard.

25 Really, when you cut through the allegations, Your

1 Honor, these are allegations that there were red flags.
2 Khronos did something in response to those red flags,
3 therefore, it's not a willful blindness case. And what
4 we're not told really is, well, what did Khronos actually
5 do, what view did they actually form, why. That's what
6 would be required to get this case over into the zone of
7 willful blindness or actual knowledge, Your Honor. There's
8 nothing about subjective belief.

9 And that's what makes this case quite unlike
10 Merkin because you don't have defendants hiding their head
11 in their sand and quite unlike Kingate because you don't
12 have any allegations that would demonstrate some sense of
13 culpability, some sense of we're dealing with a fraud here.
14 There was the sense of mystery that lots of sophisticated
15 investors grappled with, perhaps, at various points in time
16 and then put to rest in people who were -- you know, Harry
17 Markopoulos (ph) was saying this is a fraud and people
18 looked at him as though he was -- you know, he was some kind
19 of crack pot.

20 This was -- people looked at the problem of
21 options volumes, but that's a far cry from saying that these
22 defendants had any kind of subjective belief or concern that
23 there were no securities being traded.

24 Your Honor, the source of all the information --
25 what makes this complaint a little bit different, the story

1 that the trustee tries to tell here is a story that involves
2 Renaissance, and we demonstrated in our papers how when the
3 Court takes a hard look at the documents that the trustee
4 had by virtue of Rule 2004 discovery and relied on in
5 preparing the complaint that story really falls apart.

6 The essence of the story is that as -- the arch of
7 the story as the trustee tells it is Renaissance became
8 aware of these concerns. Renaissance concluded it was a
9 fraud. Renaissance got out. Khronos did the same thing,
10 but Khronos did not get out. And every part of that story,
11 Your Honor, falls apart.

12 Renaissance did not conclude it was a fraud. The
13 trustee makes much of what Renaissance -- of what there is
14 Renaissance personnel said and did, but ignores the fact
15 that in their SEC testimony to a person they said we did not
16 suspect that his was --

17 THE COURT: What --

18 MR. FISHER: -- a Ponzi scheme.

19 THE COURT: What did you expect them to say to the
20 SEC in 2009 or 2010?

21 MR. FISHER: Your Honor, I don't -- I mean, and
22 that's -- the trustee tries to --

23 THE COURT: All right.

24 MR. FISHER: -- essentially impugn the credibility
25 --

1 THE COURT: Well --

2 MR. FISHER: -- of this -- of their own witness.

3 I don't know that Renaissance wouldn't have been in a
4 position to boast that --

5 THE COURT: But if you have --

6 MR. FISHER: -- they thought there was a Ponzi
7 scheme.

8 THE COURT: -- two different contrary statements
9 by the same person, I knew and I didn't know, you can't
10 resolve that on a motion to dismiss.

11 MR. FISHER: I don't think Your -- well, I think
12 that -- I don't think that Your Honor needs to get there at
13 all because --

14 THE COURT: Well, you raised it.

15 MR. FISHER: Fair enough.

16 THE COURT: You want to withdraw that whole
17 argument about the SEC --

18 MR. FISHER: I don't think I can withdraw it, Your
19 Honor, because it's part of our papers and it's --

20 THE COURT: All right.

21 MR. FISHER: -- part of our papers because that's
22 the complaint --

23 THE COURT: If you would have filed a shorter
24 pleading then --

25 MR. FISHER: If I had known that Your Honor was

1 not interested in the Renaissance --

2 THE COURT: No.

3 MR. FISHER: -- part I certainly would have filed
4 a shorter pleading.

5 (Laughter)

6 MR. FISHER: So you have the Renaissance
7 allegations. There are not -- there are not facts
8 indicating that Renaissance formed a subjective belief that
9 it was a Ponzi scheme. And if Renaissance did, there are
10 not facts indicating that Renaissance conveyed that belief
11 or that Khronos formed a similar belief.

12 And then most of the -- many of the allegations in
13 the complaint are generic, non-Renaissance, I would say, red
14 flags, the kinds of things that Your Honor has seen before,
15 allegations about one day Intel traded outside of its price
16 range for that day. On another day Mark traded outside of
17 the price range. That's what makes this a generic inquiry
18 notice complaint where, at bottom, all its saying is what we
19 know now, if you had taken a hard look at all these things
20 you might have come to a different conclusion.

21 But the reality is there's no allegation from
22 which this Court can plausibly infer that anyone at either
23 of the two defendants subjectively formed any belief that
24 this was a Ponzi scheme.

25 And, Your Honor, it's also worth noting that if

1 both motions are granted in their entirety because Your
2 Honor finds that actual knowledge and willful blindness have
3 not been adequately pled, this is still a substantial case.
4 There is still an eighty-six-and-a-half-million dollar net -
5 profit case against Legacy. So the defendants still have
6 much to contend with, but they should not have to contend
7 with a complaint that we think Judge Rakoff's opinions make
8 crystal clear is not a complaint that appropriately can be
9 characterized as a bad faith complaint. It should have been
10 a straightforward net profits case, Your Honor.

11 THE COURT: Thank you.

12 You don't even have notes.

13 MR. KAJON: I make it up as I go along. I'll be
14 brief, Your Honor.

15 Just going back to Renaissance for a moment, the
16 facts are clear that after raising all these questions, and
17 there was a report. There were emails back and forth.
18 Renaissance didn't redeem its entire investment. It
19 redeemed half of its investment and then months later
20 redeemed the other half. And as the Renaissance
21 representative said, you don't leave half your capital at
22 risk if you think it's a fraud.

23 So maybe the guys when they were testifying before
24 the SEC had a convenient memory, but their actions at the
25 time speak very clearly. They were asking questions. They

1 were scratching their heads. They were trying to figure
2 out, how does he do it, how does he make money for us, how
3 does he make money from us. Those were the kinds of
4 questions that they were asking. It doesn't say, he must be
5 a fraud, he was running a Ponzi scheme like Merkin was
6 saying. Merkin was saying, you know, it will be known as
7 the Madoff scheme instead of a Ponzi scheme. There is none
8 of that in there.

9 Asking questions is inconsistent with actual
10 knowledge. If you have actual knowledge that no securities
11 are being traded, why are you asking questions as to how
12 does he do it.

13 THE COURT: Well, it's consistent with willful
14 blindness, though, isn't it?

15 MR. KAJON: Again, willful blindness, the trustee
16 alleges that we then did an investigation. If Legacy did an
17 investigation --

18 THE COURT: Couldn't --

19 MR. KAJON: -- was it --

20 THE COURT: -- it gather up --

21 MR. KAJON: -- willfully blind?

22 THE COURT: And it sold its securities. So
23 couldn't you gather -- through the investigation couldn't
24 you get actual knowledge as a result of that investigation?

25 MR. KAJON: Then why did they stay invested?

1 THE COURT: Well, I mean --

2 MR. KAJON: But the trustee doesn't allege -- when
3 trustee's counsel gets up ask him, show me where in the
4 complaint you allege plausible facts going to Legacy's
5 subjective state of mind that demonstrates either actual
6 knowledge or willful blindness.

7 THE COURT: You should be sitting here.

8 (Laughter)

9 MR. KAJON: Just basically, Your Honor, what -- as
10 Mr. Fisher said, this is a constructive notice pleading, you
11 know. Legacy performed all this due diligence. It must
12 have known. That's not the standard in a SIPA case.

13 Thank you.

14 THE COURT: Thank you.

15 MR. WARSHAVSKY: Good morning, Your Honor. Oren
16 Warshavsky, Baker Hostetler for the trustee.

17 Your Honor, if I may give to you and to counsel, I
18 -- to make it a little easier to follow I put -- we prepared
19 a little binder with some of the --

20 THE COURT: A slide show?

21 MR. WARSHAVSKY: It's not a slide show. It's just
22 actually the different documents from the -- to make it a
23 little easier we highlighted a few portions which I think we
24 will use to answer some of the questions posed by our
25 adversaries.

1 And, Your Honor, I think there are a few points
2 where I would like to start with where I agree with some of
3 the points Mr. Fisher made. What he starts out by saying is
4 that we all know that Madoff is a fraud. We all know that
5 he made mistakes. We all know we can find that from the
6 statements. We agree with that. And I -- I think where we
7 start our argument as a result and where we started our
8 complaint was actually Renaissance coming to this
9 conclusion.

10 What we put together were just a few of the
11 documents that were relied on in the complaint which then
12 were submitted by both Mr. Fisher and Mr. Kajon in their
13 declaration. And I thought I would -- you know, if you
14 would like to discuss Renaissance I'm happy to discuss that
15 first.

16 But I think, you know, what's interesting about
17 the proposal, about the Madoff proposal is what that really
18 was -- and I think both Mr. Fisher and Mr. Kajon asked it
19 properly. The defendants -- Renaissance was trying to
20 figure out what was going on. And it was when they were
21 going through that diligence that Renaissance realized there
22 were questions that it couldn't answer.

23 They have people who think they're smart doing an
24 analysis saying, just based on the Legacy -- now they didn't
25 have all the information Legacy and Khronos had, which were

1 the trade confirms and the -- but they had the end of the
2 month statements. They had the end of the month statements
3 and they looked at it and they saw some irregularities and
4 they saw some qualms, including the options volume,
5 including what they didn't realize, for instance, was that
6 Madoff was purchasing -- I'm sorry. I'm going to -- I
7 always get this wrong, puts in cells. But purchasing puts
8 before selling calls. Right. They noticed it from the
9 statements.

10 What they didn't know, but what Legacy and Khronos
11 knew, was that there was no margin to do that. There was no
12 Madoff could do that. So there are little points like that.
13 But the --

14 THE COURT: Let me --

15 MR. WARSHAVSKY: -- major point --

16 THE COURT: -- stop you. I read the --

17 MR. WARSHAVSKY: yeah.

18 THE COURT: You know, I read the --

19 MR. WARSHAVSKY: Sure.

20 THE COURT: -- Renaissance report.

21 MR. WARSHAVSKY: Yeah.

22 THE COURT: And while there are questions raised
23 about how Madoff did it, the entire report is taken from the
24 view that he's actually trading securities.

25 MR. WARSHAVSKY: Yeah. I think that's right. And

1 I think --

2 THE COURT: Except at the end they say, well, you
3 know, we're going to try and come up with a program and put
4 together a portfolio for it.

5 MR. WARSHAVSKY: Well, I think that's right, and I
6 think what you see, what happens, the analogy that I use in
7 the office, and I hope you're not a Carbuck, you know, it's
8 poke holes. But the analogy I came up with is, Volkswagen.
9 You know, we recently heard about the Volkswagen software
10 fraud. And you're a competitive car manufacturer, first
11 you're going to look and you're going to say, well,
12 Volkswagen has this great mileage and low emissions, go
13 figure out what Volkswagen is doing.

14 Your first assumption isn't that Volkswagen has
15 rigged the system, right. But what happens is, as you start
16 to reverse engineer, as you start to do an analysis, you do
17 understand it. And I think that's what we see as we go
18 through the Renaissance e-mails and Meritage oversight e-
19 mails, which then begin at tab 2 and are also cited.

20 And it starts with Nat Simons. And what's
21 interesting here, I think that the defendants have
22 characterized or suggested we characterize as Renaissance as
23 a white knight, we certainly not. Renaissance was in it to
24 make money. That's Renaissance's job, it's going to try and
25 reverse engineer it.

1 And Renaissance comes and looks and says, first
2 question is how does Madoff -- and if you look at the
3 November 13th e-mail from Nat Simons, he points -- there are
4 a few basic points. One is, is what he's doing illegal,
5 that's the first paragraph is all about, is what Madoff is
6 doing illegal.

7 We've heard rumors that it's illegal. And then he
8 says, how is he making his money, why is he doing this for
9 free. All right. And then you raised a few other points,
10 which I won't go in, but I think one point which is
11 interesting, they say it's a generic red flag that we raise,
12 and I'll show you because it keeps coming up, is the lack of
13 an independent auditor, right there in the middle of the
14 second full paragraph. "We have no idea if there are
15 conflicts in his business that come to some regulator's
16 attention, throw in that his brother-in-law is his auditor."

17 Well, they were wrong about that, but they were
18 right to start questioning his auditor. And they were
19 looking at all the different pieces. That starts on a
20 Thursday. By Friday, you start to see the chain go through,
21 right.

22 And then you say, well, wait a -- the next e-mail
23 is from Henry Laufer (ph) on Friday, goes back to this idea
24 of cherry-picking.

25 THE COURT: This is the one that didn't go to

1 Mayer (ph) .

2 MR. WARSHAVSKY: No, this one went to Mayer,
3 Raphael Mayer is right there in the --

4 THE COURT: And the first one.

5 MR. WARSHAVSKY: The first one to Raphael Mayer as
6 well.

7 THE COURT: Does 14 point to Mayer?

8 MR. WARSHAVSKY: Yeah.

9 THE COURT: Oh, I see Mayer.

10 MR. WARSHAVSKY: I'll show you one that didn't go
11 to Mayer. We acknowledge there is one that didn't go to
12 Mayer, but Mayer is on all these. And he then talks about -
13 - he says, look, this cherry-picking allegation, which we
14 don't know how he gets these -- he gets these ridiculous
15 places. He's always able to -- what the Renaissance report
16 said, the other report says, he's always able to trade his
17 options at the 4 o'clock price. He's always able to get
18 these extraordinary fills, where he can somehow buy all the
19 stocks at a great price.

20 He can buy -- he can only buy low, he always sell
21 high, how does he do it. Right. And here what Henry
22 Lauffer first says is first he says, that yes, my sense is
23 there something illegal, because we can't figure out, and we
24 have total independent evidence that Madoff's executions are
25 highly unusual. And they go back to the fact that they're

1 worried about Elliott Spitzer.

2 I want to turn ahead a couple of e-mails to one
3 later that day, it's at about 12:30. It's from Carl Broder
4 (ph) and it's Rand VA 00001, which Your Honor can see it.
5 And that's where he refers to Madoff as background
6 radiation, he's always had a concern. He refers to articles
7 that he's read that are now -- and again, Raphael Mayer is
8 on this.

9 And then he says, ah, but what if cherry-picking
10 isn't part of this. Who the heck is on the other side of
11 all these trades of Madoff who's willing to lose every
12 trade. How can somebody be on the other side be willing to
13 lose every trade, how do they have a compensation model that
14 has nothing to do with performance. There is no plausible
15 information for that, and that's where he continued to see -
16 - you also see further e-mails that day where different
17 individuals say they're in favor of redemption. And if they
18 can't get answers.

19 So this is in about a month of the report coming
20 down, and all this is over the course of one day. So
21 clearly it starts with, should we redeem to -- if he can't
22 answer this, he better -- that's one day they figured out.

23 Now, during that day, we turn to tab 3, and this
24 is what -- this is the e-mail that Raphael Mayer isn't on,
25 but I'd like to go through it for one moment, because I do

1 think what you'll see are the strands of how they were
2 connecting it at Renaissance, to the next e-mail which
3 Raphael Mayer himself composes, right, and that's the key
4 point.

5 Is that -- so Paul Berger (ph) then decides to
6 write off line, and he says that Khronos is going to start
7 preparing some questions for Madoff. That's the defendant
8 and as we'll see later, it's Raphael Mayer, all right.

9 And oh, I'm sorry, I think I skipped one, Your
10 Honor, I apologize. I'm sorry. The e-mail that Raphael
11 Mayer is -- I apologize for that, Your Honor, I'm looking at
12 number 3, which is tab 3, which Raphael Mayer is not on
13 there.

14 All right. And the point here is that Renaissance
15 starts making some conclusions about Madoff, right, and what
16 he says when he goes through is that the study that was
17 done, which was from '95 to '01 shows that there's not
18 enough options, it shows that there are real problems, it
19 shows that they can't figure out how he's getting these
20 trades, how is he actually being able to trade at these
21 prices.

22 And he looks and he says -- and when he goes
23 through the analysis, what he tells you is that, and we've
24 actually pled this in the complaint, that when you do the
25 extrapolation -- he says here that if you were to take a

1 look at Madoff's trades, would actually take up the entire
2 OEX for three full days. Every time Madoff does a trade, it
3 would take the entire OEX not just in that share, the entire
4 OEX, right.

5 And if you actually extrapolate out as we pled in
6 the complaint, because the sale was from 95 to Owen (ph), if
7 you extrapolate it out, we're not getting to the point yet
8 where we see the defendants do, but actually take anywhere
9 from 9 to like 18 days.

10 What they also -- and point 5, and this is again,
11 we're going to see, I'm sorry, in the paragraph 5 here, it
12 says recall point 2. And when you look at it, this refers
13 back to the discussion of who's on the other side of the
14 trades, and we're going to see this in Raphael Mayer's later
15 e-mail.

16 He says, who's big enough to be on -- if he's
17 doing this over the counter, who's big enough to be on the
18 other side, and I'm going to come back to the over the
19 counter and the OEX issue. You know, there's two options,
20 right, it's either on the -- or two choices, it's either on
21 the exchange or it's over the counter.

22 THE COURT: Where's the evidence that Legacy or
23 Mayer knew all this?

24 MR. WARSHAVSKY: Well, I think it's --

25 THE COURT: The allegations.

1 MR. WARSHAVSKY: Well, I think you can turn to the
2 next e-mail, Your Honor, which is one written by Raphael
3 Mayer, and then you have Broder on the other side of it.

4 And there are more than just this, by the way, and
5 I'll get to those in a moment. But Raphael Mayer starts
6 point, you know, number two on this is about the options.

7 And what you see is that this is being prepared by
8 Khronos, and then Paul Broder -- by Raphael Mayer on behalf
9 of Khronos, it -- Raphael Mayer says, "Greetings, all, I
10 thought it would be useful for today's meeting for us,
11 Khronos, to share what we see are the open issues for
12 research."

13 Right. So when there's a suggestion that Khronos
14 wasn't doing their research, Khronos is saying here it's
15 doing their research, right. Raphael Mayer is the one who's
16 saying it. And then he lists out everything. What we have
17 is Paul Broder --

18 THE COURT: So after regards raft, that's also his
19 --

20 MR. WARSHAVSKY: Yes. You're talking about at the
21 --

22 THE COURT: Where it starts, financial research
23 and then lists all these concerns, that's something Mayer
24 wrote?

25 MR. WARSHAVSKY: Everything that has the -- yes.

1 Everything that has the arrow in front of it, because I
2 guess Paul Broder responded. Unfortunately that's the way
3 they did it. Paul Broder, you can see where there's not a -
4 -

5 THE COURT: Where does Mayer's e-mail end and
6 Broder's begin?

7 MR. WARSHAVSKY: I think Mayer's begins at the
8 very top, where it says Mayer Raphael wrote --

9 THE COURT: Yes.

10 MR. WARSHAVSKY: And then --

11 THE COURT: But this is all Broder.

12 MR. WARSHAVSKY: No, no, this is all --

13 THE COURT: This is Broder writing what Raphael
14 wrote. And that's just that one paragraph, isn't it?

15 MR. WARSHAVSKY: No, no. Your Honor, what he did
16 was he wrote over it -- I think where you can tell the
17 difference is where there's not a little arrow beginning,
18 Broder states --

19 THE COURT: There's arrows through every line on
20 this entire e-mail chain.

21 MR. WARSHAVSKY: No, there's not. If you go down
22 to let's say options, which is about a third of the way
23 down.

24 THE COURT: Yes.

25 MR. WARSHAVSKY: Right below that, you see

1 confirmed with him that the options trades, that was written
2 by Broder to Raphael. But Raphael does the first --
3 anything with the arrows is what Raphael did. So Raphael
4 does --

5 THE COURT: I am very confused about who was it at
6 what portions of this e-mail. It seems to be one e-mail
7 from Broder to Raphael and others, and I just don't know
8 what's --

9 MR. WARSHAVSKY: All I can tell you is when you --
10 what happens to us, Your Honor, when we forward an e-mail, I
11 think it's the same with any others, that when we forward an
12 e-mail from like an iPhone or something like that, the part
13 that's -- you're forwarding has like either an arrow or a
14 line in front of it.

15 THE COURT: But you can always tell where one e-
16 mail ends and the next one begins.

17 MR. WARSHAVSKY: Unless somebody comments and
18 interspersed. But it wasn't -- it wasn't made for today.
19 Unfortunately, it wasn't made as part of evidence, it was
20 part of a discussion, and we do the same thing where we
21 sometimes respond in caps or different colors. But when
22 it's a plain text e-mail, this is how -- I don't think the
23 defendants would disagree with this.

24 But in any event, even if it's from Broder to Rah
25 (ph), you know, we would suggest to you that Khronos is

1 actually -- the way e-mail works is that anything with the
2 arrow in front of it is Raphael, right, because it's -- and
3 it all starts with Mayer Raphael wrote, and it goes all the
4 way through the bottom until we get -- and you can see where
5 it's forwarding the Nat Simon's e-mail for instance, which
6 said, "we'd like to prepare for this."

7 THE COURT: So if Raphael wrote it, why is this e-
8 mail being sent to Raphael with cc's to everybody else?
9 He's telling him what he wrote?

10 MR. WARSHAVSKY: No, I think what's happening
11 here, much to any group discussion works, Your Honor -- I
12 know we do it this way, I don't know how -- but when you're
13 commenting on somebody else's -- or somebody else has
14 written above instead of writing an entire narrative above
15 it, you go to each point, this is how they -- this is what
16 we see in the other -- in some of the other e-mail trails.
17 But --

18 THE COURT: Is there an issue whether Raphael
19 wrote all this?

20 MR. FISHER: Your Honor, I would like an
21 opportunity to explain what we think this e-mail --

22 THE COURT: Well, if anything else, we're trying
23 to gauge its importance.

24 MR. FISHER: Well, just -- so just on the factual
25 question of who's the author here, this is an e-mail that

1 Paul Broder sent to Mr. Mayer.

2 THE COURT: I see that.

3 MR. FISHER: In its entirety. But what we
4 believe, and of course this is not an evidentiary hearing,
5 but we're just laying allegations, but what we believe this
6 is, is Mr. Broder took an e-mail that Mr. Mayer had sent to
7 him, and then interpolated into that e-mail his own
8 commentary on Mr. Mayer's points.

9 So, in fact, Mr. Mayer's e-mail is not sarcastic
10 at all, for example. It's a very just straight forward, and
11 it is as Mr. Warshavsky said, where you see an arrow, that
12 likely is Mr. Mayer writing. And it's a straight forward
13 description of here's what I think we should do as follow-
14 up.

15 And then you see some interpolations that Mr.
16 Broder made --

17 THE COURT: Oh, I see.

18 MR. FISHER: -- to that e-mail. And then Mr.
19 Broder copied that e-mail to other colleagues at
20 Renaissance, as part of this discussion about what people
21 were seeing with regards to Madoff's accounts, and what
22 people were thinking about in terms of next steps.

23 THE COURT: Okay. Thank you. Go ahead.

24 MR. WARSHAVSKY: So again, if we look at what the
25 bullet -- the numbered points are. We start first again,

1 that Khronos is actually preparing that. Mr. Mayer is
2 sending it over. Number one, he wants to know the assets
3 and the strategy. And the only reason to know about assets
4 under management is to do extrapolations and to figure out
5 what the trading volumes are. Right.

6 The next thing is, they go into the options. Now,
7 putting aside Mr. Broder's commentary and some of the
8 sarcastic remarks, the point was, what Mr. Mayer was going
9 to ask was, to know about the options, and he wanted to know
10 how does he get the prices, and what are the strikes
11 relative to the underlying stock.

12 And again, that goes back to the fact that the
13 options were traded on -- puts were bought, and then the
14 calls were sold, separate from the underlying securities
15 trade, which is noted in the Renaissance proposal. It's
16 noted throughout the other e-mails.

17 That's the reason for trying to understand how
18 does he set his prices, how does he pay. But then we get
19 through the discussion, you know, and Raphael Mayer says he
20 wants to know who's on the other side, and then we see Mr.
21 Broder's response as to what Raphael Mayer should say,
22 should he speak to Madoff, which is all about, what banks --
23 who would be willing to do this, who's willing to lose every
24 trade, who's big enough to be on the -- if you're really
25 doing this over the counter because you couldn't do it on

1 the exchange, who's big enough to be on the other side of
2 these trades and willing to lose all the time.

3 These all -- look, these are great rhetorical --
4 for the trustee, this is terrific, because it shows that
5 there is no legitimate answer. And as Mr. Fisher states, we
6 know that there was no one on the other side, we know there
7 was no legitimate answer to any of these questions.

8 But the point is, for our purposes, what we've
9 heard from both sets of counsels, there's no truth that
10 there was anybody doing any diligence. This e-mail and if
11 we turn to the next page, you see more of it. They're going
12 through volumes, how does he do pricing, who's on the other
13 side --

14 THE COURT: Where do you allege or is it
15 reasonable to infer that they knew that he was not trading
16 securities, that actually Legacy knew not Renaissance?

17 MR. WARSHAVSKY: Well, we don't have an allegation
18 flat out that they knew he was trading those securities, and
19 if we did have that, they would tell you it was conclusory.
20 What we actually say --

21 THE COURT: But I mean the facts. Okay. So
22 there's a lot of stuff in here, they have a lot of questions
23 about Madoff how he does it.

24 MR. WARSHAVSKY: Well --

25 THE COURT: And Legacy's point of view, is they

1 then -- is that it then conducts an investigation.

2 MR. WARSHAVSKY: And what would I turn to then,
3 Your Honor, is --

4 THE COURT: Where do you allege or imply that as a
5 result of that investigation, they learn he was not actually
6 engaged in the trading of securities?

7 MR. WARSHAVSKY: Okay. So one example, for
8 instance, would be the discussion about where Mr. Fisher
9 drew Your Honor's attention earlier. I'll go first to the
10 option, but then I'll go to other facts as well.

11 But -- because the options tends to be an easier -
12 - so you can't trade options that weren't there. And if
13 you'd turn to the options --

14 THE COURT: But that assumes you know externally
15 how many options are being traded.

16 MR. WARSHAVSKY: Well, that's true --

17 THE COURT: We know that just from the statements.

18 MR. WARSHAVSKY: Well okay.

19 THE COURT: And you allege that based upon the
20 review of the confirmations and the monthly statements they
21 knew, and I don't know how they would know that based on the
22 review of the confirmations and monthly statements.

23 MR. WARSHAVSKY: Okay. So what they would know
24 from just the confirmations, I'll start with that, is that
25 they are traded over the exchange. And we have the

1 allegation in the complaint, I'll ask one of my colleagues
2 to pull it up, I think it's -- but the point is, that they
3 had a QSIP identification and while Renaissance didn't know
4 that, Legacy certainly did, because it was receiving the
5 confirmations. And what the QSIP code means is that it's
6 being traded on the exchange, okay.

7 And then what I would turn Your Honor's attention
8 to, and we allege it in the complaint, and the defendants
9 have given you the actual documents, I'll go to it, which is
10 at tab 5 of what I've given you, which is the account
11 services agreement. I'm sorry, it's paragraph 57 is the one
12 about the -- is the paragraph.

13 THE COURT: 57?

14 MR. WARSHAVSKY: Is the paragraph at the QSIP
15 identification notes. And so we certainly do allege it, and
16 every confirmation that they received how the QSIP --

17 THE COURT: I understand it was in there, but
18 where does it say or imply, ah-ha, that meant to them that
19 he was not trading in securities?

20 MR. WARSHAVSKY: Well, I think you have to look at
21 the facts together. So you know they're being traded over
22 the exchange, and then if you look at the account services
23 agreement, you know, and there's already been a discussion
24 about the problem with the exchange.

25 But if we turn to the account services agreement,

1 and in particular, I would turn you to the services
2 schedule, which is at page 6. All right. And if you look
3 at paragraphs 2, 3, and 4, which talk about historical load
4 data, which was from 2000 to 2004, then a different
5 historical load data, which was going back in time from --
6 '92 to '99, and then the ongoing services, right. And all
7 of them require entering trades on a daily basis.

8 And then valuing the portfolio daily, based on the
9 end of day pricing, and store price volume statistics from
10 IDC, that's how I know, because they said -- because they've
11 said that Khronos agreement with the defendants was to do
12 price volume statistics at the end of every day, each time
13 they got a confirm, and they were supposed to continue
14 valuing it even when they did it.

15 So any time they got a confirmation from Madoff,
16 whether he was trading above it, they were doing a volume
17 analysis according to this. When they -- every day when
18 they got a price out of range, which is another red flag
19 that we've gone to, and it's a hallmark where he's trading
20 outside of the range, they know it's not -- that the -- that
21 it's -- that it's not trading at that price.

22 When they get 155 out of 159 of their dividend
23 payments are on the wrong day and they go to verify it
24 against Fidelity, they know that there's nothing in the
25 market when they go to confirm it with Fidelity that shows

1 that that money is coming.

2 And ultimately what that means is they know that
3 what's showing up on those statements and in those confirms,
4 and the money that's showing up in their account is money
5 coming from another source. Wherever it's coming from is
6 not what Madoff -- it's not on these trades that Madoff is
7 reporting to do for them.

8 And I think that when you look at those together,
9 and so Mr. Fisher's quite right when he says, Renaissance
10 didn't -- I'm sorry, not Renaissance -- Legacy, neither
11 Legacy nor Khronos created the chart, and we've included a
12 slightly bigger one at tab 7 I think. But what you can see
13 from those charts, very clearly what they were seeing every
14 day.

15 We did it as a demonstrative. We can list out
16 every day where the 26 percent of the trades, but I think
17 it's enough. They certainly received it. At the end of the
18 day, this is a notice pleading, and we've listed examples,
19 and those examples, there's no explanation for it.

20 In particular, there's no explanations for days
21 where there's trades or where Madoff is trading in a
22 security that doesn't show up in anything that they can
23 confirm.

24 I'd also turn Your Honor's attention --

25 THE COURT: Let me ask a question.

1 MR. WARSHAVSKY: Yeah.

2 THE COURT: Why is plausible to infer that someone
3 who knows there's a Ponzi Scheme continues to invest in it?
4 They're not insiders of Madoff and part of the inner circle,
5 there's no allegation that we've seen in some of the other
6 cases of people warning them before the fact that this is a
7 scam.

8 MR. WARSHAVSKY: I agree that --

9 THE COURT: Why does someone do that?

10 MR. WARSHAVSKY: You know, I don't know, and we
11 haven't had discovery here, and the answer -- the simple
12 answer is greed.

13 THE COURT: Well, explain to me why it's plausible
14 influence.

15 MR. WARSHAVSKY: Well, because simple answer is
16 greed. And it starts with the fact that Madoff is walking
17 away from the money and point of fact, you can really see
18 them at Renaissance e-mails, but let me just talk about the
19 money.

20 Madoff walks away from the fee, and these
21 defendants made \$36 million. Right. That's a pretty good
22 motive perhaps. You know, at this stage, we don't know what
23 they were thinking, we didn't get 2004 discovery from --

24 THE COURT: So you're saying that they're doing it
25 for the thing, not for whatever money is invested with

1 Madoff?

2 MR. WARSHAVSKY: I'm giving you what I think is a
3 plausible answer. They could be doing it for money with
4 Madoff, but I think --

5 THE COURT: But sooner or later it's going to
6 collapse and everybody's going to figure this out.

7 MR. WARSHAVSKY: You know, good -- Ponzi Schemes
8 don't last because of good judgment. And people -- lots of
9 people think they can do things that are too good to be
10 true. If you ask, you know, if you ever look at these
11 surveys, 90 percent of people think they're above average
12 drivers, the other 40 percent are wrong. 95 percent think
13 that a broker or whatever those studies are, if you look at
14 Forbes, think that when a broker says that they have
15 something where they can trade better than the market,
16 people believe it.

17 People think they can stay involved in schemes
18 that are too good to be true, and point of fact, if you look
19 at Renaissance, which is kind of interesting, the very first
20 Nat Simons e-mail, he's actually doing an analysis. Why?
21 It's money. Right. He's saying, he doesn't know if it's
22 worth the risk, but acknowledging the risk, he's still
23 saying yeah, but it's 18 percent, maybe we should stay,
24 maybe we should just keep getting our money and we'll deal
25 with it when it comes. Now --

1 THE COURT: But her never thought it was a Ponzi
2 Scheme.

3 MR. WARSHAVSKY: But he still thought it was
4 illegal. He still thought it was going to zero, he's still
5 in the e-mails, that it could go to zero. All right. Now -
6 -

7 THE COURT: But that's to a better investment.

8 MR. WARSHAVSKY: Well, but he thought because --
9 but he was saying in a connection way, Elliot Spitzer coming
10 in and freezing it. And then later on, Paul Broder does say
11 in the e-mail to Nat Simons, maybe he's not trading at all,
12 none of this adds up, and they stayed an investor. Why? I
13 don't know that at this stage where -- you know, and that's
14 part of the problem with -- when you're at the pleading
15 stage is some of the questions that are being asked here --
16 what we've pled is that they've looked at it, they saw the
17 evidence.

18 Again, what's interesting is nobody disputes that
19 Madoff never traded. Nobody disputes that the evidence was
20 all there. The defendants accuse us of looking at it in
21 hindsight, but the fact is, the same -- what they're saying
22 are generic red flags. We can show you at the time, not
23 only was Renaissance looking at it, not only was Renaissance
24 raising it to Raphael Mayer, but afterwards and Khronos then
25 says, you know what, we'll take over everything, we'll do

1 it, nobody gets to look at it, we'll be our own service
2 provider from now on. We'll do our own accounting, we'll do
3 our own analysis.

4 Another company owned by the Mayers, they've
5 actually listed everything, every single that they have, but
6 a lot of what they have here, all shows it clearly, and
7 there's no alternative explanation. There's no -- and so
8 the question why, I don't know why people would do it. I
9 mean, and I don't think we can plead that, we could satisfy
10 a Rule 11 obligation for pleading it here without any
11 discovery.

12 THE COURT: Let me ask you a different question.

13 MR. WARSHAVSKY: Sure.

14 THE COURT: It has to do with the subsequent
15 transfer allegation --

16 MR. WARSHAVSKY: Yeah.

17 THE COURT: -- involving Mount Pelier (ph).

18 MR. WARSHAVSKY: Yeah.

19 THE COURT: How do you get from BLMIS to Mount
20 Pelier to Khronos?

21 MR. WARSHAVSKY: So from -- I'd take one step
22 back, if that's okay for one moment, which is that Mount
23 Pelier and HCH originally had their own accounts, and that's
24 pled in the complaint, and then they get covered by Legacy.

25 Legacy has two investors, from what we can tell,

1 Mount Pelier and HCH. All the money coming out of Legacy
2 and going from Legacy to Mount Pelier is going to be coming
3 from BLMIS.

4 What we have, and again this is part of -- but if
5 you take a look at what I have as Exhibit 6, the hand-out,
6 it's the Mount Pelier offering memorandum, and you go to
7 Roman numeral 4.

8 THE COURT: What page is that?

9 MR. WARSHAVSKY: It's Exhibit 6, Roman numeral 4
10 on the bottom. It's before page 1.

11 THE COURT: Oh, Romanet 4? Okay.

12 MR. WARSHAVSKY: Yeah, Romanet 4, I'm sorry.

13 And you'll see under structure, it talks about HCH
14 and Khronos being the investment managers up at the top, and
15 then under fees and expenses, a management fee at the end --
16 and this is what's pled in the complaint, but here's where
17 we take it from, "a management fee at the annual rate of 1.2
18 percent of the net asset value of shares is paid monthly in
19 advance to the investment managers. A performance fee of 5
20 percent of each shareholder's new investment profits with
21 respect to each share at the end of each quarter is paid to
22 Khronos subject to loss carrying forward."

23 THE COURT: The question I had is, where do you
24 get that the money's that paid by Mount Pelier to Khronos
25 originated with BLMIS in the complaint, where do you allege

1 that? What facts?

2 MR. WARSHAVSKY: What we allege in the complaint
3 is that the money went out from BLMIS to Legacy and then I'm
4 just going to consult with my colleague.

5 THE COURT: All right.

6 (Pause)

7 MR. WARSHAVSKY: I think what we've -- Your Honor,
8 we -- I don't think we know, and so that was why I started
9 with it, so.

10 THE COURT: But you have to allege --

11 MR. WARSHAVSKY: Right.

12 THE COURT: You have to have allegations that -- I
13 would assume, that BLMIS made a transfer to Renaissance and
14 Renaissance -- I'm sorry, Mount Pelier and --

15 MR. WARSHAVSKY: Well, BLMIS to Legacy.

16 THE COURT: Okay. So where's the allegation that
17 Legacy made transfers to Mount Pelier?

18 MR. WARSHAVSKY: We don't have them, Your Honor.

19 THE COURT: So how can I conclude that the money
20 that Mount Pelier paid to Khronos originated with BLMIS on
21 the basis of these pleadings?

22 MR. WARSHAVSKY: I'm sorry. Yeah, that's -- the
23 only answer we have is who the Legacy investors were, which
24 were Mount Pelier and HCH.

25 THE COURT: But there's no allegation that Legacy

1 actually paid money or made a distribution to Mount Pelier.

2 MR. WARSHAVSKY: That's correct, Your Honor.

3 THE COURT: Okay.

4 MR. WARSHAVSKY: Does Your Honor have any other
5 questions?

6 THE COURT: No, thank you.

7 MR. WARSHAVSKY: Okay.

8 MR. FISHER: Your Honor, I think that in Merkin
9 (ph) and in Kingate (ph) the Court started to provide some
10 real clarity about the difference between willful blindness
11 and actual knowledge. And I think that to let this
12 complaint squeak through would really throw that standard
13 into disarray.

14 Because really all Mr. Warshavsky has argued is
15 that when you look at the accounting services agreement, and
16 the fairly generic types of services that Khronos said it
17 was providing to Legacy, the fact that for example, it said,
18 we'll look closely at all of your statements and so on, that
19 because they looked closely at that information, it must be
20 that they concluded that this was a fraud. And any
21 sophisticated investor with the benefit of hindsight, the
22 trustee could say the same thing. It was your job to look
23 at the account statements.

24 Now in 2015, we've looked at the account
25 statements, we see these anomalies, therefore, you must have

1 known it was a fraud.

2 THE COURT: For example, they're saying if they're
3 looking at the account statements on a daily basis and
4 comparing the reported trades to what the actual trades
5 were, they would've seen hundreds of times that the trades
6 were outside the daily price range.

7 MR. FISHER: And it would've caused one to ask
8 questions. To get -- I think what they've essentially pled
9 is that now that we analyze this kind of information, we see
10 paths that could have led certain kinds of sophisticated
11 investors to posit that this was a Ponzi Scheme as one of
12 other possible theories as to how it was that Madoff was
13 doing what he did.

14 What they have not pled is that Khronos and/or
15 Legacy actually pursued some path that led them towards any
16 subjective belief or concern that this was a Ponzi Scheme.

17 THE COURT: Without using the phrase Ponzi Scheme
18 and just referring to not trading securities, why wouldn't
19 the comparison, for example, of the daily prices that were
20 being reported by Madoff to be actual prices alert them that
21 these can't possibly be trades.

22 MR. FISHER: So in the documents, including in the
23 Renaissance proposal, there's talk, for example, maybe he's
24 using average prices.

25 THE COURT: But I'm talking about -- we're talking

1 now about that Khronos is doing -- and this came up in
2 Kingate also where you have people who were making actual
3 comparisons and they're going to information outside of the
4 statements to see if they're consistent with the statements.
5 So why can't I infer that they learn whatever that
6 comparison would have shown even though the trustee is now
7 able to accumulate this information in hindsight?

8 MR. FISHER: I mean, without the using the word
9 "Ponzi scheme", I think you can infer that had any of those
10 issues been scrutinized, which is something the trustee is
11 asserting they should have done, must have done, had any of
12 those anomalies been scrutinized, it would have caused them
13 to scratch their heads. How you get from there to say there
14 were no securities being traded, I don't think that that's a
15 fair inference from the facts that have been alleged. It
16 can be alleged as to anyone. You can allege that any
17 sophisticated investor that studied their Madoff statements
18 would have realized it was --

19 THE COURT: Well, maybe he's not. Maybe the
20 answer is you can.

21 MR. FISHER: That's right. And I think that under
22 the old standard, under the standard that applied the non-
23 SIPC cases, that would be enough. You would then look at,
24 under that standard, the standard that doesn't apply in the
25 SIPC case, you would then look at the nature of the due

1 diligence itself and say in light of the red flags, was the
2 inquiry reasonable.

3 The trustee doesn't even meet the old standard
4 because the trustee doesn't finish the story and say, well,
5 so what due diligence was conducted. In fact, the trustee -
6 - when Mr. Warshavsky points you to the accounts services
7 agreement, he's conflating a lot of things. That account
8 services agreement was not part of some due diligence
9 investigation that was triggered by red flags. That was the
10 routine document.

11 THE COURT: I understand that. But isn't it
12 reasonable to infer that Khronos did whatever they agreed to
13 do in the accounts services agreement?

14 MR. FISHER: Yes.

15 THE COURT: And if it did that, wouldn't it have
16 discovered impossible option trades, trades outside the
17 daily price range? And when you start to accumulate all
18 these things, wouldn't it lead to the conclusion that these
19 are not real trades?

20 MR. FISHER: If it had done that work, it may
21 have. It may have seen those things. These allegations
22 are, essentially, that if it did that work, Khronos saw
23 those things.

24 THE COURT: If Khronos saw those things, would
25 that permit the inference that they knew that these were

1 fictitious trades?

2 MR. FISHER: No, Your Honor.

3 THE COURT: Why not?

4 MR. FISHER: Because the prices might have been
5 misreported. There's a theory that they might have been
6 reporting average prices or averages over a few days. There
7 are a host of explanations that people might have considered
8 in response to those kinds of anomalies. And even that
9 question is already far afield --

10 THE COURT: Is there any evidence that they
11 followed up on these inconsistencies that one might infer
12 they noticed?

13 MR. FISHER: There are no allegations in the
14 complaint one way or the other.

15 THE COURT: So why against the minimum? It was
16 suspicious -- I mean, I think certainly the papers lay out a
17 strong basis to conclude that everybody was suspicious that
18 there was something highly unusual going on here. And
19 either they discovered this and didn't do anything or they
20 didn't discover it. But why isn't that a willful blindness?

21 MR. FISHER: Well, because the premise to the
22 question is already that they saw these things which is not
23 --

24 THE COURT: Well, certainly, the premise is
25 everybody was suspicious or there was enough suspicion about

1 Madoff that people were going out and hiring experts or
2 doing their own internal analysis that they -- he did what
3 he said he did.

4 MR. FISHER: Right.

5 THE COURT: There's no need to figure it out. And
6 if Khronos performed the account services it had agreed to
7 perform, it would have noticed these anomalies. Generally
8 speaking, anomalies in the pricing, in the options. And you
9 said, though, if they had noticed it, they would have
10 followed it up. But there's no evidence and no allegation
11 that they followed it up. So why isn't that sufficient for
12 a willful blindness? And that's really Merkin who didn't
13 follow up anything.

14 MR. FISHER: Right, except Merkin said, and the
15 allegation was, I've made my peace with Madoff and --

16 THE COURT: Well, there was a lot to it but the
17 bottom line was that Merkin was making statements about what
18 everybody should be doing but didn't do anything.

19 MR. FISHER: Right. Well, this complaint is
20 strange in that it seems to allege that Khronos did a lot of
21 due diligence. So it sort of skips over the willful
22 blindness stage --

23 THE COURT: Well, no.

24 MR. FISHER: -- and tries to get right to actual
25 knowledge.

1 THE COURT: It's suggesting that they discovered
2 the things -- even if they didn't know and they were just
3 suspicious initially. They discovered all these things.
4 And you're saying it would have raised questions and they
5 probably would have followed up. But there's no evidence
6 they did that. And that sounds like willful blindness.

7 MR. FISHER: But what's strange about the
8 question, Your Honor, is that there's no allegation that
9 they did not follow up. The allegation in the complaint --
10 it's replete with allegations that what they did in response
11 was follow up. And that's -- willful blindness requires
12 subjectivity. That's where this -- this complaint never
13 comes close to anything suggesting some kind of subjective
14 culpable conduct on the part of Khronos or Legacy.

15 And, Your Honor, I appreciate all the time Your
16 Honor's devoted to this argument. Very quickly, I would
17 like to just draw attention to a few points that emerged
18 from the binder that Mr. Warshavsky shared with you. The
19 Renaissance proposal, which I know Your Honor has looked at
20 in tab 1, at the bottom of page 3, I think that this is a
21 good illustration of what I meant when I said that
22 Renaissance did not posit that there were no securities
23 transactions going on as a theory.

24 THE COURT: No. I mean, that comes out of the
25 report.

1 MR. FISHER: Right.

2 THE COURT: They do think there were securities
3 transactions. They just can't figure out how he does it.

4 MR. FISHER: Exactly, even though --

5 THE COURT: And there are some questions raised
6 about the options trading.

7 MR. FISHER: And even though the options volume
8 doesn't make sense, they don't infer from that that there
9 must be no options trading going on. They raise all kinds
10 of possibilities for further investigation.

11 Tab 2, which is the e-mail from Mr. Simons of
12 Renaissance to a group of people, the concern -- the
13 reference there that Elliot Spitzer -- this is all based on
14 Mr. Simons reporting something that he heard from an ex-
15 Madoff trader. And there's, again, all kinds of concerns
16 about whether he's cherry-picking trades, how he's doing it
17 and whether that could give rise to an investigation by the
18 attorney general. It shed no light on this idea that there
19 were no securities transactions.

20 THE COURT: Well, cherry-picking implies that
21 there was trading.

22 MR. FISHER: That's for sure. In fact, speaking
23 to an ex-trader, when I lived here, it was traded.

24 Tab 3, as Your Honor knows, that's not an e-mail
25 that was shared with Mr. Mayer. And I think the trustee has

1 corrected that point today on the record.

2 Tab 4. That's the very confusing e-mail where Mr.
3 Broder provides insertions to Mr. Mayer's e-mail. All it
4 shows is, again, there were questions about options volume
5 and Mr. Mayer was coming up with some plan to continue to
6 further investigate it.

7 And that's why I say the complaint tells half the
8 story. And so? And so, at what point did Mr. Mayer form
9 any subjective belief about what was or wasn't happening?
10 And what facts have you alleged to show that his subjective
11 belief was that there were no securities transactions going
12 on?

13 On the question Your Honor asked about tracing
14 transfers to Montpellier back to customer property, Mr.
15 Warshavsky talked about the offering memorandum for
16 Montpellier, which is tab 6. The offering memorandum says
17 really clearly that Montpellier was a diversified fund that
18 invested in a host of other matters. So adding even another
19 layer of problem to the Montpellier subsequent transfer
20 allegations is that they don't even try to allocate some
21 portion of the transfer back to --

22 THE COURT: I think that was at issue in Dreyer.
23 I don't think I have to do that for pleading purposes. As
24 long as there's a reasonable basis to infer that at least
25 some of the money originated with BLMIS. But there's no

1 allegation in the complaint that Legacy ever made a transfer
2 to Montpellier.

3 MR. FISHER: No, there's not, Your Honor.

4 THE COURT: All right. Thank you very much.

5 MR. FISHER: Thank you.

6 THE COURT: I'll reserve decision.

7 Let's take a ten minute recess and then I'll hear
8 the argument in the other matter.

9 (Recess from 11:10 a.m. until 11:24 a.m.)

10 THE COURT: Please be seated. Next, Mendelow.

11 MR. ARKIN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. REISEN: You want to speak first?

14 MR. ARKIN: I just want to say I'm Stanley Arkin.

15 THE COURT: How do you do?

16 MR. ARKIN: I appear for Mr. Mendelow. And my
17 colleague, Alex Reisen, who will be speaking mainly to --

18 THE COURT: Right.

19 MR. ARKIN: -- (indiscernible) here.

20 THE COURT: Okay. Go ahead.

21 MR. REISEN: Alex Reisen from Arkin Solbakken
22 representing defendants, Steven Mendelow, Nancy Mendelow,
23 Cara Mendelow, Pam Christian and C&P Associates, Ltd. and
24 Inc.

25 I'm sure we're going to talk about the actual

1 knowledge exception. I just wanted to bring to the Court's
2 attention certain language in Ida Fishman that actually
3 raises the question about whether even an actual knowledge
4 exception still could persist. And that -- in the
5 beginning, the third and fourth paragraph of that, they
6 define the class of people that they're trying to claw back
7 from as people that profited from Madoff's Ponzi scheme,
8 whether knowingly or not. And then they define the question
9 -- they don't define the class as we all know it's -- you
10 know, good faith defendants. But -- and also, they define
11 the question as whether they can claw back, whether the
12 types of transfers are the type that are securities.

13 And then at the last paragraph, they talk about
14 Congress' balance between finality and equity and that you
15 have to respect Congress' balance. And then there's this
16 wording, cannot go past two years at all.

17 So I just want to raise that. I don't think we'll
18 have to reach it. It's an alternative --

19 THE COURT: That's in (indiscernible) with the
20 safe harbor, though.

21 MR. REISEN: Yes. And that's what we're talking
22 about, the safe harbor, the 546(e) safe harbor.

23 THE COURT: Are you saying -- are you arguing that
24 even if the defendants had actual knowledge that Madoff was
25 conducting a Ponzi scheme that the trustee can't go back

1 more than two years?

2 MR. REISEN: I'm saying that potentially you can
3 read Ida Fishman that way. That is -- we all understand
4 that those were good faith plaintiffs, what Cohmad says. I
5 understand what can -- I understand what was just argued. I
6 just want to bring that language to the Court's attention.
7 I haven't seen it argued that way.

8 THE COURT: I thoroughly -- I'm familiar with the
9 language.

10 MR. REISEN: Fair enough. Okay. Very good. So
11 you're also quite familiar clearly with the strictness of
12 the Cohmad standard. It is at a minimum so it's not an
13 exemplar. Actual knowledge is the high degree of certainty
14 beyond high probability of known securities trades. So
15 extraordinarily high standard.

16 Then I think, really, the key message here is that
17 we are cabined in by Merkin. I think this decision really
18 could be a one-word decision. It could be Merkin, motion
19 granted. And I think the key difference between Merkin is
20 that he -- in the words that Your Honor used. He developed
21 an understanding and appreciation of what the red flags
22 could mean. That is, that indicated a potential Ponzi
23 scheme. He said this appears to be a Ponzi scheme. He was
24 aware of the impossibility of trades. He was told of the
25 possibilities.

1 THE COURT: Is this really a red flags case? This
2 sounds like --

3 MR. REISEN: Can it --

4 THE COURT: The sense I get from the complaint is
5 it's almost an allegation of an aiding and abetting type.

6 MR. REISEN: Solely red flags. No allegations of
7 any subjective interpretation of the red flags. And, in
8 fact, to the extent that you want to say what is a
9 reasonable inference, they're sort of -- and I understand
10 that this is not in the complaint but, as Your Honor knows,
11 when you judge whether something's plausible, you use all
12 your experience and things like that.

13 We have this funny thing. We're actually
14 Preet Bharara. And Judge Swain from the southern district
15 actually say that Paul Konigsberg comes out and files in the
16 southern district of New York, someone who has all the red
17 flags that Mendelow had, guaranteed rates of return,
18 referral fees, paybacks and more. He had (indiscernible) in
19 fraudulent transaction and he personally backdated options
20 trade. Both of them come out. It's totally in an
21 unsurprised and conclusion. They don't feel the need to
22 explain themselves. That -- he had known we're at zero.
23 High degree of certainty, high probability, known suspicion
24 of a Ponzi scheme. So Mendelow was actually less than zero
25 to some extent.

1 THE COURT: So you're saying that Mendelow -- I
2 mean, Madoff got together and said let's really cook up
3 these account statements so I can make money. That's not an
4 indication that they knew that. No actual securities were
5 being traded.

6 MR. REISEN: Where is that allegation?

7 THE COURT: I'm asking you a hypothetical
8 question. I do that.

9 MR. REISEN: Of course. If they got together and
10 -- can you ask the question again?

11 THE COURT: Yeah. Mendelow and Madoff got
12 together and said let's create some fictional account
13 statements so that that will justify more payments to me.
14 That wouldn't support an inference that he knew that Madoff
15 is not engaged in the trading of securities?

16 MR. REISEN: I don't even think that would be a
17 high degree of certainty of (indiscernible). But --

18 THE COURT: I think we have a basic disagreement
19 on the state of the law. But --

20 MR. REISEN: Okay.

21 THE COURT: -- with all due respect to the U.S.
22 attorney.

23 MR. REISEN: Fair enough. Fair enough. But let's
24 talk about the one big move that they make in their motion
25 which is that they say that Mendelow personally directed --

1 personally participated in the fraud by directing --

2 THE COURT: It's all in paragraph 94 of the
3 complaint. So why isn't paragraph 94 -- why isn't that
4 sufficient to -- and you can get a copy of the complaint.

5 MR. REISEN: Sure. That would be great.

6 THE COURT: But why isn't that a sufficient
7 allegation to support --

8 MR. REISEN: Well, what --

9 THE COURT: -- the -- let me -- please, let me
10 finish.

11 MR. REISEN: Sure. I'm sorry.

12 THE COURT: Why isn't that a sufficient allegation
13 to support the conclusion for purposes of the motion to
14 dismiss that the complaint pleads that Mendelow directed
15 BLMIS to create fictitious trades to catch up with the
16 shortfall between he was promised and what the statements
17 showed.

18 MR. REISEN: Right. So what is actually alleged
19 is three things. He calculated what he was owed in referral
20 fees, a straight percentage of what he referred from
21 Telfran; that he looked at his account balance at the end of
22 the year, or whatever, do I get my 230 grand. And if he
23 didn't, he calls him and says can you make this up. No
24 allegation (indiscernible) he did it by trading, that they
25 did it by fake trading. In fact, it's just the opposite.

1 They allege that they did it secretly and independently.

2 The Schupt process which they did it for dozens of people
3 and it was handwritten.

4 Now let me -- if I can make --

5 THE COURT: Can I ask you a question?

6 MR. REISEN: Sure.

7 THE COURT: And it's not in the complaint but how
8 did -- how was Mendelow paid his commissions? You know,
9 through a voting clients or customers, whatever.

10 MR. REISEN: In this case, it is alleged that --

11 THE COURT: I'm asking how it really happened. In
12 other words, normally, I would think that if somebody was
13 earning a commission for referring investors --

14 MR. REISEN: Right.

15 THE COURT: -- they receive a check --

16 MR. REISEN: Right.

17 THE COURT: -- at some point.

18 MR. REISEN: Right.

19 THE COURT: The complaint seems to say that the
20 way Mendelow was compensated was that value --

21 MR. REISEN: That's exactly right.

22 THE COURT: -- was added to his account. Now I
23 suppose that that could be done legitimately by --

24 MR. REISEN: Yeah. Well, they allocate winning
25 trades.

1 THE COURT: Let me --

2 MR. REISEN: I'm sorry.

3 THE COURT: I suppose that could be done
4 legitimately by putting money into the account or putting
5 securities into the account. Is that the way he was
6 compensated, though, through his accountant?

7 MR. REISEN: Exactly right. Exactly right. So he
8 just looked at it and that's where the (indiscernible) are.
9 And you could see that he has an injunction from the SEC
10 saying do not trade securities. Do not refer securities
11 without a registered -- so -- and I think Mr. Warshavsky
12 actually said --

13 THE COURT: Isn't that an unusual way to
14 compensate somebody?

15 MR. REISEN: Is it unusual.

16 THE COURT: In other words, unless you actually
17 see somebody putting cash in -- a cash deposit were the
18 deposit of securities, how do you get compensated by -- how
19 do you get compensated? I don't understand.

20 MR. REISEN: Yes. I agree it's not maybe the
21 usual way. Does it lead to any sort of -- one single
22 factual allegation that he recognized this as unusual, that
23 he went from high degree of probability to a certainty or
24 actual knowledge that he's not trading securities. And Mr.
25 Warshavsky said he'll see something strange, the Volkswagen.

1 You don't immediately see it's the thing but you start
2 conversing (indiscernible). If you have a strange way of
3 paying referral fees, you don't say, oh, I'm absolutely
4 certain that this is a totally implausible thing that's
5 never happened before that it's been doing for 20 years with
6 billions of dollars, no one's figured it out, that's not
7 good, it's not plausible that that's a -- the
8 non-speculative strong imprints that's pled with
9 particularity. Whereas in Merkin, you have a subjective
10 interpretation of such an unusual thing. You know, one
11 after the other. He actually talks to Bernie Madoff and
12 says what about these daily trades, the (indiscernible)
13 trades? What about the lack of self-clearing. He's told
14 that it's impossible. He has all of that stuff and even
15 Merkin does not reach the actual knowledge. So Mendelow
16 doesn't even reach Merkin. He never forms any suspicion
17 about that this is unusual. Yes, it's inquiry notice,
18 that's correct. It is an unusual way to do it.

19 THE COURT: Go ahead.

20 MR. REISEN: Okay. So the big -- and this is
21 their big move. And so, they're asking to infer from those
22 facts checks and balances, it's not enough. Give it back.
23 It's analogous to if Mendelow looks at his drying cleaning
24 bill and says, oh, you've been overcharging me 200 dollars.
25 I'm going to call up the dry cleaner and says, hey, pay me

1 back 200 dollars; you overcharged me. Now unbeknownst to
2 Mendelow, the dry cleaner is a drug addict. She's been
3 stealing from the till and overcharging customers. She goes
4 out on the street and knifes someone to death for
5 (indiscernible) 200 dollars and pays back Mendelow. Did
6 Mendelow personally participate in the street murder by
7 personally directing him to commit street murder? Of course
8 not. But that's exactly the trustee's logic.

9 So that's the jump. So we're cabined in by
10 Merkin. We're cabined in by Konigsberg. We're less than
11 zero. And the other allegations are referral fees
12 generally. We already know that Judge Stanton says no
13 indication of fraud. And in general, you have guaranteed
14 rates of returning the same way of paying you back at the
15 end of the year. You get up to the percentage by basically
16 allocating you winners, I suppose. If it was even alleged
17 that Mendelow looked and saw that it was trades being done -
18 - he just looked at his balances, right?

19 So that -- again, if we guaranteed rates of return
20 matter, the SEC would have known when they looked at the
21 Telfran thing. They knew the guaranteed rates which were --

22 THE COURT: Well, obviously, the SEC was wrong.

23 MR. REISEN: Yes, clearly. Right. But I guess
24 the question is was it a plausible inference. And they even
25 think of it as for a second.

1 And we have in both Prickett and in Merkin, highly
2 -- impossibly high rates and consistent rates. Still,
3 unless
4 you --

5 THE COURT: Well, I think it's a difference
6 between generally performing at an unusually high rate and
7 you guarantee those rates.

8 MR. REISEN: Yes. Well, let's talk about that. I
9 guess the idea is that, yes, if you're -- if at the end of
10 the year you're at 16 percent, I'm going to bring you up to
11 17 percent, right, by allocating you trades. It's not --
12 it's
13 a -- the plausible non-speculative imprint is not that Steve
14 Mendelow suddenly had actual knowledge that it's the thing
15 that's never happened before. And again, there's not even
16 any -- even if that was, there's no -- again, it's inquiry
17 knowledge. There's no allegation that he ever interpreted
18 this and had an understanding and appreciation, the words
19 that Your Honor used.

20 And this is the same language used in Prickett.
21 You never even get to the middle level of requisite.

22 THE COURT: Bridget?

23 MR. REISEN: Prickett. It's actually a 10(b)(5)
24 in the Madoff context. But it's the same thing in the --
25 the Court there said that you don't -- unless you interpret

1 such a red flag with a high degree to have -- be some sort
2 of subjective indication. Unless you translate it, you
3 don't even get to recklessness. It's not probative.

4 So -- and then we have the Fifth Amendment
5 imprints, which we've already looked at Judge Stanton. It
6 says you don't even need it to draw the inference. If you
7 do, it's weak. Everyone was thought to be brought into a
8 criminal vogue. In this case, I suppose if you were going
9 to think of, well, what was Mendelow thinking, he was
10 probably afraid of criminal contempt on the injunction
11 perhaps. But, again, it's not -- the trustee offered
12 nothing that could ever make such a jump. I plead the
13 Fifth. All of a sudden, he had actual knowledge that Bernie
14 Madoff never traded any securities.

15 And this is also distinguishable -- I think the
16 line that Your Honor has brought in is in the Kingate and
17 Surretti (ph) case. And the difference there is that not
18 only did they not have a subjective interpretation of Merkin
19 but now in Surretti, they actually do the comparison, figure
20 out he's doing fictitious trades, talk to each other about
21 how it's a scam and all the reasons for it. And then make
22 up stories. Try and keep other people out. Right? I mean,
23 they list all the different things. What are they going to
24 ask? What stories are they going -- you going to tell?
25 They fabricate the stories. They don't go and investigate.

1 So -- and, of course, there's -- I mean, the
2 relationship of both Merkin, very close inner circles,
3 Surretti, Mendelow. The sole allegation of his special
4 access is he can refer clients. He can get them in contact,
5 you know, give him his phone number, type of thing. Not
6 inner circle. Not a special access type of case.

7 So that's Surretti. That's -- I believe that's
8 all of the allegations of actual knowledge.

9 And then I guess we've asked that Your Honor not
10 give them the leave to amend. I think we have delay. We
11 have futility. They're not even close. They haven't even
12 offered a possible new allegation. They've had tons of
13 discovery. They've had all of our documents for five years.
14 There's nothing that they can add.

15 THE COURT: Well, this complaint is obviously
16 drafted before these various cases came down explaining the
17 standard.

18 MR. REISEN: Yes.

19 THE COURT: Why not give him another chance to
20 plead in accordance with the standard that's now been
21 established?

22 MR. REISEN: Yes. If it wouldn't be futile, of
23 course.

24 THE COURT: Well, how do I know if --

25 MR. REISEN: If they could offer an allegation.

1 But there isn't -- there's no facts. We know that there's
2 no facts. They have the documents. They've been doing
3 discovery that no plaintiff has ever dreamed of --

4 THE COURT: Well, maybe --

5 MR. REISEN: -- for five years.

6 THE COURT: Maybe when they drafted this
7 complaint, they thought that what they drafted was
8 sufficient and what they thought the state of the law was
9 then.

10 MR. REISEN: Oh, I think they did. I think that's
11 right. But I think the problem is that they -- you need to
12 actually propose a fact that would make it not futile,
13 right? They had represented to this Court even after Ida
14 Fishman that they're not thinking of amending. Now if they
15 thought
16 actual -- remember, back in when Katz was decided, if they
17 knew this was an actual knowledge case, they could have just
18 gone ahead. Why did they give us four years of extensions
19 if Katz wasn't going to matter, if they were pleading actual
20 knowledge anyway? They could have just gone ahead. We're
21 going to be prejudiced. We thought we were going to have to
22 do objective notice which is essentially the only reason a
23 person would have done. Now all of a sudden, we've got to
24 go back five years. How are we going to prove subjective
25 state of mind. Totally different set of evidence. We are

1 prejudiced.

2 THE COURT: Why didn't you move to dismiss the
3 complaint four years ago?

4 MR. REISEN: Well, because -- that's a great
5 question. Because we didn't want to waste the resources.
6 What if Katz and Ida Fishman goes the other way? It's
7 useless. The whole point is -- our whole understanding was
8 that we're waiting to see -- of course, you're not --

9 THE COURT: Well, can't you make the same argument
10 as to why they didn't amend the complaint? If you're
11 waiting before you make the motion to dismiss, why isn't it
12 fair for them to wait in order to make a decision to amend
13 the complaint? For instance, the court of appeals could
14 have said (indiscernible) notice was enough.

15 MR. REISEN: Well, they -- yes. They thought that
16 they were going under actual -- they're claiming to believe
17 that they've always had actual knowledge. If they had
18 actual knowledge, they could have gone ahead and -- anyway,
19 there would have been no reason to wait if they thought they
20 had actual knowledge.

21 Now -- and either way, the point is that it's
22 their burden to plead. It's not our burden to inform or
23 move to dismiss when it's going to be a waste of time.

24 THE COURT: So why not let them re-plead and see
25 if they can re-plead the complaint?

1 MR. REISEN: Well, because we're prejudiced.

2 Because --

3 THE COURT: How are you prejudiced?

4 MR. REISEN: Because we're not -- mostly because
5 of the time that we've been forced -- we won't be able to go
6 and get subjective evidence.

7 THE COURT: What do you mean?

8 MR. REISEN: Evidence as -- it's a totally
9 different set of evidence that -- we're on notice five years
10 ago that their complaint is -- they never even claimed
11 (indiscernible) any subjective notice at all. There's no
12 facts at all. We've never been -- so we're waiting -- we're
13 trying to get evidence on, I guess, object of notice. All
14 of a sudden, five years down the line, we've got -- oh, it's
15 a totally different thing.

16 THE COURT: But you knew that was the standard at
17 the test. Didn't you start to gather that evidence?

18 MR. REISEN: We're not on notice that there's any
19 possibility that we could ever even face a claim. There's
20 not even a conclusory statement of anything like actual
21 knowledge --

22 THE COURT: So what kind of evidence would you
23 have to gather?

24 MR. REISEN: -- let alone facts.

25 THE COURT: What kind of evidence would you have

1 gathered that you can no longer gather?

2 MR. REISEN: Well, I suppose everyone's testimony,
3 everyone's memory, what did Steve tell you, what was his
4 thoughts, subjective thoughts about this. His memory fades.
5 People -- I mean, for example, DiPasceli is now dead, right?
6 We want to ask, well, were there any conversations that
7 Mendelow --

8 THE COURT: Did he have any conversations with --

9 MR. REISEN: I think --

10 THE COURT: -- DiPasceli?

11 MR. REISEN: I don't believe so but --

12 THE COURT: So --

13 MR. REISEN: But we could ask DiPasceli did you
14 ever have any conversations with Mendelow, right?

15 THE COURT: Well, Mendelow will say I didn't and
16 they won't be able to say anything else, will they?

17 MR. REISEN: Well, I suppose that's right. But
18 the bottom line, I guess, is that they've had so much
19 evidence. They've made this motion that we believe is
20 actually -- there's no basis for. We've had to defend
21 against it. They claim that they're not going to amend it.
22 They don't even have a basis to amend. They still don't
23 even propose in their complaint what they could possibly
24 add. So how can we even argue futility. And the case law
25 actually says that you can infer that it's going to be

1 futile.

2 And again, we're not even close. We're way down
3 below zero. They've got to get up to 99. They've got to
4 pass Konigsberg and Merkin, all the way up. What are they
5 going to allege? There's nothing -- there's no facts --

6 THE COURT: Let's find out.

7 MR. REISEN: Very good. Very good. Thank you.

8 MR. ARKIN: You want to mention Konigsberg?

9 MR. REISEN: I think we did speak about
10 Konigsberg, is that correct? Konigsberg and Preet Bharara
11 and about how he had more red flags and still be --

12 THE COURT: Well, but that's what the U.S.
13 attorney says.

14 MR. REISEN: Fair enough. Fair enough.

15 THE COURT: Okay.

16 MR. REISEN: It just goes --

17 THE COURT: We may disagree on that.

18 MR. REISEN: Fair enough.

19 MR. ARKIN: Why do you say, Your Honor --

20 THE COURT: Sure. Speak into the microphone,
21 please.

22 MR. ARKIN: I'm sorry. I should be closer. I
23 just want to say Preet is the U.S. attorney.

24 THE COURT: Yes. I understand --

25 MR. ARKIN: A responsible public official for law

1 enforcement, a man who had a number of these cases passed
2 through its office. He comes out and he says what he says.
3 And in the period of time we've had this case in our office,
4 five years, six years, there's been nothing coming from them
5 remotely suggesting actual knowledge on the part of our
6 clogged (indiscernible). He was getting commissions for
7 clients or investors he -- starting in 1993 he recommended
8 to the company, New York (indiscernible). There was
9 nothing, six years, which has emerged which shows what
10 Merkin and Konigsberg demonstrate actual knowledge is on the
11 part of Mr. Mendelow. Just nothing.

12 THE COURT: Thank you.

13 MR. NEW: Good morning, Your Honor. Jonathan New
14 from Baker Hostetler for the trustee. With me at counsel
15 table this morning is Robertson Beckerlegge also of Baker
16 Hostetler.

17 THE COURT: How do you do?

18 MR. NEW: Your Honor, as I think the standard has
19 been clearly set out here. The standard to overcome the
20 546(e) safe harbor is the complaint has to plausibly allege
21 facts suggesting that the defendants had actual knowledge
22 that there were no legitimate securities transactions
23 occurring in the accounts. And while I am prepared to
24 discuss, Your Honor, I think there are several different
25 facts in this complaint that support that allegation going

1 all the way back to his relationship with Telfran and the
2 SEC action through the guaranteed rates of return.

3 THE COURT: Yeah. I read all that. And I read
4 the Avellino again in his motion. I don't know what that
5 has to do with actual knowledge there were no securities
6 being traded.

7 MR. NEW: Your Honor, I think it's context. And
8 it goes to what their state of mind was at the time that
9 they did enter into the transactions that Your Honor
10 (indiscernible) which is what is the key fact here, which is
11 what's alleged in paragraphs 94 through 96 of the complaint.

12 THE COURT: See, the way I read paragraph 94,
13 Mendelow says there's a shortfall. You owe me money. Make
14 it up. That's all that paragraph 24 (sic) alleges. And
15 then -- 94. And then it goes on to allege in the last
16 sentence that the way BLMIS did it is it created fictitious
17 trades in the accounts. But unlike some of the other cases
18 we've seen where -- and I'll use Cohmad as an example that
19 the defendant
20 Jaffe -- he actually participated in directing the creation
21 of fictitious and backdated trades. That's not -- I don't
22 read 94 to allege that. Can you allege in words or
23 substance that Mendelow actually got together with
24 representatives of BLMIS, whether it's Madoff or somebody
25 else, and said, you know what, I want you to create these

1 fictitious trades as a way to compensate me? Can you make
2 that allegation?

3 MR. NEW: Well, Your Honor, what we do allege --
4 and then --

5 THE COURT: I guess the answer is no.

6 MR. NEW: No. Your Honor, I think we can in the
7 sense that I think it's here. And I'm stuck to what's in
8 the complaint.

9 THE COURT: I don't agree that it is. I just
10 don't see it.

11 MR. NEW: Your Honor, may I proceed?

12 THE COURT: Go ahead.

13 MR. NEW: I think first you have to understand
14 what is the nature of these -- what we call fraudulent side
15 payments but they were co-worker (indiscernible) --

16 THE COURT: They're -- you can call them
17 fraudulent side payments. And that's --

18 MR. NEW: But I think, Your Honor --

19 THE COURT: -- you know, that's an inflammatory
20 phrase. I didn't -- it looks like they're commissions.

21 MR. NEW: Your Honor, if you prefer to call them
22 commissions --

23 THE COURT: Well --

24 MR. NEW: -- you can call them commissions but --

25 THE COURT: If you want to call it fraudulent side

1 payments --

2 MR. NEW: But --

3 THE COURT: -- go ahead.

4 MR. NEW: But the key issue is the nature of them.

5 And I think Your Honor had this colloquy with Mr. Reisen as
6 to exactly how they occurred every year, every December, in
7 the accounts that he was monitoring. And so, from the very
8 beginning when he first started receiving these commissions,
9 if you'd like to call them that, they weren't payments.
10 They weren't checks. They weren't cash. They weren't
11 securities deposited into the accounts. They weren't, as
12 Mr. Reisen seems to suggest, some allocation of winning
13 transactions from someplace else in BLMIS.

14 What were they? They were trades in these
15 accounts based upon the principal supposedly in those
16 accounts that yielded the magic pre-determined amount every
17 single time. And it was done through these options
18 transactions. The allegations here are that Mr. Mendelow
19 knew that he was receiving them, that he tracked his
20 accounts, he monitored whether he received it, he was
21 looking at his accounts. He would not have seen any other
22 way he was receiving these fees other than through such
23 fictitious transactions.

24 So with that as background, when you get to the
25 point that he tracks and monitors those accounts, does a

1 calculation which is based upon his understanding of a 17
2 percent guaranteed return and also the amounts of these
3 transactions. And he says that should have been my return,
4 my yield on my account. And then he compares that to what
5 he actually got as returns on the account. And then he says
6 no, you need to make it up to me. There's no other way that
7 that could have been made up to him given his knowledge of
8 what's been going on in these accounts other than through
9 these fictitious transactions.

10 THE COURT: Well, but, you know, your brief in
11 several places says that Mendelow directed BLMIS and Madoff
12 to do this. He may have acquiesced to it but I don't see
13 where he directed --

14 MR. NEW: Your Honor --

15 THE COURT: -- Madoff to do certain things other
16 than make up the shortfall.

17 MR. NEW: Your Honor, that's a straight quote
18 practically from paragraph 96 which says "The fact that
19 Mendelow was able to direct the value of his accounts at
20 BLMIS based upon his own calculations and to ensure he
21 received specific amounts through fictitious options
22 transactions is indicative of his knowledge of fraudulent
23 trading activity."

24 THE COURT: I don't read 94 as directing the value
25 in his accounts. Again, it's just saying you owe me money,

1 make up the shortfall. And then it says the way BLMIS did
2 it is it added these fictitious trades to the account to
3 generate the "profits" necessary to make up the difference.

4 MR. NEW: Well, Your Honor, in ways --

5 THE COURT: That's really what is alleged.

6 MR. NEW: Well, I think it alleges that but there
7 is -- if it's not explicit, and I think it is more explicit
8 than that, but there is the inference of how was that done
9 because if he's looking at his accounts before, as we say
10 he's closely monitoring them, and he sees that the only way
11 he's getting these gains is through securities transactions
12 and then he says make it up to me, and it's corrected, and
13 he looks back at his accounts and he sees there's no inflows
14 of money, there's no inflows of securities. (Indiscernible)
15 fictitious options transactions.

16 THE COURT: Okay. But there were options
17 transactions listed in the statements which generated the
18 profits, right -- the shortfall?

19 MR. NEW: Correct. The exact amounts of profits.

20 THE COURT: So why isn't it plausible for him to
21 assume that Madoff gave to these transactions, allocated
22 them and that's how he made up the difference?

23 MR. NEW: Well, Your Honor, I think there's
24 several reasons why that's not plausible. I think, first of
25 all, the fact that he's engaging in speculative options

1 transactions over a number of years that always hits on a
2 pre-determined amount is not plausible.

3 Second, he has various accounts that he's
4 monitoring. Some of these accounts, for his daughters, for
5 example, do not receive these fictitious options
6 transactions. All these accounts are supposedly engaging in
7 the same strategy. If Madoff is able to invest his funds in
8 such a way to get a return of 20 percent or more in his
9 accounts, why isn't he doing that in all the accounts? It's
10 not plausible to imagine that a broker could go out in the
11 securities market and always, in the same month, in every
12 year engage in securities transactions that only -- that
13 always yield the pre-determined amounts.

14 THE COURT: Actually, you just raised an issue
15 about the other accounts. Don't -- doesn't the liability of
16 some of those account holders depend on the imputation of
17 Mendelow's knowledge?

18 MR. NEW: That's correct, Your Honor.

19 THE COURT: All right. I understand
20 (indiscernible) C&P. But as to the other transferees, where
21 are the allegations it's (indiscernible) imputation?

22 MR. NEW: Your Honor, the other allegations with
23 regard to (indiscernible) C&P are that, effectively, that
24 Mr. Mendelow acted as their agent.

25 THE COURT: That's a conclusion. What are the --

1 MR. NEW: Yes, Your Honor. The only allegation in
2 the complaint -- and again, you know, we pled this at a
3 time, Your Honor, when we did not believe we had factual
4 knowledge for all the defendants.

5 THE COURT: Do you want to re-plead your
6 complaint?

7 MR. NEW: Well, Your Honor, we think it's
8 sufficient.

9 THE COURT: All right.

10 MR. NEW: But if it's not, we were going to ask
11 for leave to re-plead.

12 I would point, Your Honor, to paragraph 6 of the
13 complaint which says that all the BLMIS accounts basically
14 were managed and overseen by Mr. Mendelow.

15 THE COURT: That's -- that just sounds like a
16 conclusion to me.

17 MR. NEW: It may be, Your Honor. It --

18 THE COURT: I've had other cases where, for
19 example, the principal or the agent is getting all the
20 account statements and reviewing all the account statements
21 and giving directions relating to all the account
22 statements. And that's not in this complaint.

23 MR. NEW: It's not, Your Honor, quite frankly,
24 because we didn't, at the time, believe we needed to plead
25 that. If we do need to plead that, Your Honor, we can re-

1 plead and include allegations --

2 THE COURT: But don't think you have to plead
3 that? I mean, this -- the entire complaint is sprinkled
4 with knew or should have known and know or should know, but
5 that's not the standard. At least for now.

6 MR. NEW: That's correct, Your Honor.

7 THE COURT: All right.

8 MR. NEW: Although it does say "knew" so there is
9 --

10 THE COURT: Well --

11 MR. NEW: -- an alternative. It is an
12 alternative argument.

13 THE COURT: But then again, that's a conclusion
14 that something knew something. You'd have to allege facts.

15 MR. NEW: Yes, Your Honor. And I believe, as we
16 are -- we've been discussing the facts there are to support
17 that knowledge.

18 The one thing we haven't touched on, Your Honor,
19 is the guaranteed rates of return which, similarly, the
20 allegations in the complaint are that he knew he was going
21 to be receiving a guaranteed return on his accounts of at
22 least 17 percent. He obviously knew before that in Telfran
23 that he was getting a guaranteed return from Madoff as well.
24 And when you're dealing with securities transactions in the
25 market, it is just implausible for anyone to believe that

1 you can get a guaranteed return. And that's what he was
2 guaranteed here. And not only did he know that, he was
3 tracking it. So it wasn't that he was hopeful that he would
4 get it or that he was monitoring. He expected to get it.
5 And when he didn't get it, that was part of what he asked
6 them to correct.

7 So again, that goes to the fact that he had actual
8 knowledge that they were not securities transactions that
9 were occurring in his account. And I think it also goes
10 without saying, Your Honor, although it's not an independent
11 basis to conclude this that when Mr. Mendelow was deposed on
12 these issues, he was specifically asked about the fraudulent
13 side payments and the guaranteed rates of return and other
14 things, he did invoke his Fifth Amendment rights and refused
15 to answer.

16 THE COURT: All he's told me is that he invoked
17 the Fifth Amendment right. So I don't know what he was
18 asked as to which he invoked his Fifth Amendment privilege.

19 MR. NEW: Well, there is an allegation, and it is
20 general, Your Honor, that he was asked questions
21 specifically about fraudulent side payments and about the
22 guaranteed returns and about Avellino and Bienes and he
23 refused to answer those questions.

24 Again, Your Honor, this complaint --

25 THE COURT: I don't know what it says. Anybody

1 who was being deposed or questioned by the U.S. attorney or
2 the SEC at the time might very well have invoked the Fifth
3 Amendment privilege even though it had -- they had no
4 participation or level of participation that's needed to
5 support an inference of actual knowledge.

6 MR. NEW: Your Honor, again, it's a permissible
7 inference; it's not a mandatory inference. We would suggest
8 that that is not by itself enough, but given the other facts
9 that we have alleged that show actual knowledge, that
10 factually it's the fraudulent side payments, the facts
11 allege the guaranteed rates of return, that given that, his
12 refusal to answer is sufficient to add to that inference
13 that we've pled enough to meet the actual knowledge
14 standard.

15 And with regard to leave to re-plead, Your Honor,
16 obviously, we believe that the complaint is sufficient. If
17 it's not, we would ask for leave to re-plead. Some of the
18 issues that we've discussed this morning, Your Honor, are
19 things that could be addressed if necessary in an amended
20 complaint. And --

21 THE COURT: So why don't you just re-plead the
22 complaint if you think you can make those allegations?

23 MR. NEW: Your Honor, quite honestly, we think
24 that it's sufficient and it would be a waste of not only
25 judicial resources but our own resources --

1 THE COURT: Got it.

2 MR. NEW: -- to file an amended complaint and go
3 through another briefing schedule if this complaint is
4 sufficient.

5 Also, Your Honor, at this time, we don't have the
6 ability to amend as of right. Given the way that the
7 defendants have proceeded in this case, we would need to
8 seek leave of Court to amend.

9 THE COURT: So why don't you make a motion for
10 leave to amend and attach your proposed complaint. And
11 they'll argue it's few words not (indiscernible) and deal
12 with it that way.

13 MR. NEW: Again, Your Honor, we could do that but
14 it would be a waste -- we think it would be a waste of
15 resources.

16 THE COURT: Well, I think it's -- I'm not
17 convinced that this is a sufficient complaint. And I think
18 it's a waste of resources to have to go through this
19 exercise to then grant you leave to amend and then go
20 through the exercise a second time. But all right.

21 Certainly, there are valid claims, I think, under
22 the first claim which is just a fictitious profits claim
23 (indiscernible). I wouldn't dismiss that claim.

24 MR. NEW: Yes, Your Honor. Well, we believe it's
25 sufficient on all the counts.

1 THE COURT: All right. I got it.

2 MR. NEW: If Your Honor is inclined, we would seek
3 to make a motion for leave to amend.

4 THE COURT: I just think it'll save a lot of time.
5 If you think that you can make -- if you can allege that he
6 actually knew or maybe he willfully blinded himself, because
7 that's another distinction that has arisen over the last
8 four years, that you should allege it. But this complaint
9 replete with knew or should have known. It was just -- and
10 I understand why it was done. It was done when everybody
11 thought that's what the state of the law was.

12 All I'm suggesting is when I review this, I'm
13 probably going to conclude that except for the first claim
14 for relief, it probably is insufficient the way it's pleaded
15 under the old standard. And it'll expedite things if you
16 just make a motion for leave to amend and attach the
17 complaint that it meets the pleading standards
18 (indiscernible).

19 MR. NEW: Your Honor, we will definitely do that.
20 Should we -- do we need to, at this time, address a briefing
21 schedule on that or should we discuss it with the parties?

22 THE COURT: I think you should just -- well, you
23 can discuss it with your colleague but I just think that's
24 the best way to handle this. And if you can really plead
25 it, then you can plead it and we'll deal with that complaint

1 'cause most of the complaints I've seen have been amended to
2 comply with the pleading requirements that have been
3 enunciated in the various cases. This one wasn't for some
4 reason. And I understand that the defendant didn't answer
5 until November 2014, I think. And they said they didn't
6 want to waste my time. But, you know, at the same token, I
7 understand you don't want to waste the time. But just
8 judging from what's pleaded here, I think it would make
9 sense to seek leave to re-plead. But you don't have to. I
10 will decide this.

11 MR. NEW: Your Honor, I think we will be seeking
12 leave to re-plead.

13 THE COURT: Can we leave it at that? You'll make
14 a motion, you'll attach an amended complaint, and you can
15 argue that you're prejudiced or it's futile or there's been
16 an undue delay although for the reasons I've discussed,
17 you've already told me you wanted to wait. So, you know, I
18 suppose they're entitled to wait.

19 MR. NEW: We can make that argument in the
20 briefing but, yes, that's fine.

21 THE COURT: 'Cause you haven't convinced me about
22 prejudice. You may have to put in --

23 MR. NEW: Fair enough.

24 THE COURT: -- some affidavit explaining
25 somebody's died or some evidence has been destroyed and you

1 can't defend the action for that reason.

2 MR. NEW: Okay.

3 THE COURT: And if I deny the motion for leave to
4 re-plead then maybe I'll decide this motion. All right.
5 Does that make sense?

6 MR. ARKIN: Makes sense.

7 THE COURT: Okay. So I will hold this one in
8 abeyance and I look forward to your motion.

9 MR. ARKIN: Only one thing --

10 MR. NEW: Thank you, Your Honor.

11 MR. ARKIN: -- Your Honor.

12 THE COURT: Yes, sir?

13 MR. ARKIN: Somebody used the word "imagine".

14 THE COURT: Pardon?

15 MR. ARKIN: Somebody used the word "imagine" just
16 a few moments ago. I think Mr. New. No imaginary
17 allegations.

18 THE COURT: Well, we can't sensor what they plead
19 beforehand. Only after, I guess. So we'll see what they
20 say.

21 MR. NEW: Your Honor, we --

22 MR. ARKIN: It's a prayerful admonition.

23 MR. NEW: Your Honor, we are mindful --

24 THE COURT: I join in that. These complaints are
25 very long.

1 MR. NEW: Your Honor, we're mindful of Rule 11
2 and, obviously, we're not going to make any imaginary
3 allegations.

4 THE COURT: No. No. I -- okay. Thank you very
5 much.

6 MR. NEW: Your Honor, there is also a discovery
7 issue --

8 THE COURT: Yes.

9 MR. NEW: -- in this.

10 THE COURT: Let me just mark -- make a note of
11 that that's --

12 MR. ARKIN: Good morning, Your Honor.

13 THE COURT: Thank you very much.

14 MR. ARKIN: Thank you very much.

15 THE COURT: You're excused. You're welcome to
16 stay but you're excused.

17 MR. NEW: Your Honor, the discovery dispute
18 includes that as well.

19 THE COURT: Oh, okay. Yeah. Why don't we take
20 yours -- well, it's really tied up -- and I understand that
21 they didn't understand or maybe they should move for a
22 protective order. I didn't see the -- did you file an
23 objection?

24 MR. REISEN: We didn't -- oh, sure. We objected.
25 And then we want to move for a stay if we needed to. But I

1 think the hope is that we will just wait and see whether
2 they --

3 THE COURT: Doesn't the objection -- don't you
4 have to do something if they object to the document request
5 like make a motion compel discovery?

6 MR. NEW: Well, Your Honor, that's what we
7 actually noted -- notified the Court --

8 THE COURT: Yeah.

9 MR. NEW: -- that it was a pre-motion conference
10 and a motion to compel.

11 THE COURT: Doesn't it make sense to see if the
12 complaint survives in this case?

13 MR. NEW: Your Honor, the complaint is going to
14 survive, as you said, at least with respect to one count.
15 They --

16 THE COURT: So you want to take discovery on that
17 one count?

18 MR. NEW: Well, Your Honor, I think --

19 THE COURT: It's almost a strict liability count.

20 MR. NEW: Well, Your Honor, they're refusing to
21 provide any discovery at all.

22 THE COURT: Right. Well, you --

23 MR. NEW: They refuse to answer any of the
24 interrogatories. And with regard to the documents that
25 they've previously produced, they won't stipulate to the

1 fact that they can be used in this case. So we don't have
2 any documents other than eight pages of documents that
3 they've produced. And no interrogatory responses at all.

4 THE COURT: But at the --

5 MR. REISEN: Your Honor --

6 THE COURT: -- end of the day, the only case may
7 be the case that's alleged in Count I.

8 MR. REISEN: We've given all discovery on Count I.
9 In fact, we produced it all. That shows all of the two-year
10 transfers. We'll wait completely. And we're willing to do
11 that. We can --

12 THE COURT: My suggestion is that rather than get
13 involved in discovery before we know whether we have a
14 sufficient -- legally sufficient complaint that we determine
15 that first.

16 MR. NEW: Your Honor --

17 THE COURT: And you're right. You can take
18 discovery on the first claim and then if, as you -- when you
19 seek more discovery, they're going to say, hey, wait a
20 minute. You know, this is becoming -- they're onerous --
21 you're seeking discovery in stages.

22 MR. NEW: Your Honor, I would simply ask that they
23 actually comply with the local rule and respond to the
24 interrogatory requests that were sent to them. They gave no
25 responses to any of the interrogatory requests.

1 THE COURT: Oh, you didn't object?

2 MR. REISEN: Oh, we did. Sure. We objected --

3 THE COURT: In the interrogatory responses?

4 MR. REISEN: Yes.

5 MR. NEW: It was a general objection, Your Honor.

6 MR. REISEN: We're happy to give all objections if
7 they want. We just think that that would be extra work.

8 THE COURT: Well --

9 MR. REISEN: And we may actually move for a stay.
10 But we're perfectly willing to give discovery on
11 (indiscernible). We already have.

12 THE COURT: My concern is if you're taking
13 discovery before you have a legally sufficient claim and
14 might argue we use that discovery to bolster the allegations
15 which is exactly what you're not supposed to do.

16 MR. NEW: Except, Your Honor, the only thing I
17 would point out is if this case does not arrive -- what's
18 present before Your Honor is not a motion to dismiss.
19 What's present before Your Honor is a motion for judgment on
20 the pleadings. There is a case management order in place in
21 which they agreed to proceed on discovery. We would have
22 had -- if they had not been obstructionists, we would have
23 actually had the benefit of that discovery to use going
24 forward.

25 This -- and even in a motion to dismiss, Your

1 Honor, the state of the law is generally a stay is not
2 appropriate. And there needs to be good cause for a stay.
3 In this case, we don't think that they've established good
4 cause. And they haven't even moved for a stay, Your Honor.
5 And they have entered into a case management order in which
6 they agreed to proceed with discovery.

7 MR. REISEN: If I could, Your Honor, as I
8 understand that we're contemplating dismissing everything
9 but Count I in the -- and we're having --

10 THE COURT: Well --

11 MR. REISEN: -- to give discovery on the one count
12 that's legally sufficient. And then if they get to plead,
13 of course give discovery on that as well.

14 THE COURT: Well, but he's saying, look, you know,
15 it's a case management order. The motion itself doesn't
16 stay discovery. And you were required to give discovery a
17 long time ago and you never did it.

18 MR. REISEN: Well, for what it's worth, actually,
19 we've given them essentially everything five years ago. But
20 -- in the 2004. But for what it's worth, it's my
21 understanding that, yes, we will give full discovery on
22 everything that's still a valid pleading on file which will
23 be just that one --

24 THE COURT: But there is a valid pleading on file.

25 MR. REISEN: That's right. Count I.

1 THE COURT: Well, no. There's a valid pleading.
2 And all I suggested was, if you want, I'll decide this
3 pleading and then I'll grant the leave to re-plead. If I
4 dismiss it, all I'm suggesting is to cut through that
5 because I do have questions about the sufficiency of the
6 pleading and have them make a motion to re-plead and then
7 you can make your futility and delay and prejudice
8 arguments.

9 MR. REISEN: Yeah. So -- but at that point, the
10 only -- you will have dismissed --

11 THE COURT: I'm not dismissing their complaint.

12 MR. REISEN: Fair enough. Well, I guess the idea
13 would be that you would dismiss all but Count I and then you
14 would see whether they have a right to re-plead and at that
15 point, we'll give full discovery on the one count that's
16 remaining. And then if you give them lead to re-plead,
17 we'll, of course, give discovery on that as well.

18 THE COURT: Look, I'm going to hold the discovery
19 in abeyance. Let's just see if you have a valid complaint
20 or if it's just a claim for fictitious profits which is a
21 much different claim from the type of claim you're trying to
22 plead.

23 MR. NEW: Yes, it is, Your Honor. Thank you, Your
24 Honor.

25 MR. REISEN: Thank you, Your Honor.

1 THE COURT: We have a couple other discovery
2 issues, though.

3 All right. Yes? Go ahead.

4 This is -- let's start with Bernfeld.

5 MS. HOCHMUTH: Yes, Your Honor.

6 THE COURT: Okay. I called your case early. I
7 know you had a flat tire.

8 MR. WEDEEN: I apologize, Judge.

9 THE COURT: No, no. That's all right. But --

10 MR. WEDEEN: I got a flat tire (indiscernible)
11 tow.

12 THE COURT: That's the reason why you got behind
13 some long cases. Go ahead.

14 MS. HOCHMUTH: Thank you, Your Honor.

15 Your Honor, I'm here today on three cases. My
16 name is Farrell Hochmuth of Baker Hostetler on behalf of the
17 plaintiff, Irving Picard. The three cases we're here on is
18 the Marilyn Bernfeld Trust, Michael Bellini and Ellen
19 Bernfeld. These cases -- all of these cases, opposing
20 counsel is Mr. Wedeen.

21 The parties held an initial case conference in
22 June of 2014. There was -- a case management notice was
23 filed in each of the cases requiring initial disclosures by
24 August 27th of 2014. I have requested that counsel provide
25 those initial disclosures numerous times. We have now

1 propounded requests for admission, requests for production
2 and interrogatories. We have not --

3 THE COURT: Is this an innocent investor case?

4 MS. HOCHMUTH: Yes, Your Honor. These are -- all
5 three cases are good faith investors.

6 No responses have been received to any of the
7 discovery. We extended the deadlines based on the request
8 of counsel a couple times. We still don't have discovery
9 responses.

10 Yesterday, I did receive initial disclosures in
11 each of the three cases so we are no longer asking that Your
12 Honor order that those initial disclosures be made. But we
13 are requesting an order deeming the request for admissions
14 admitted pursuant to Federal Rule of Civil Procedure
15 36(a)(3). And we would also seek an order compelling
16 responses to discovery by a date certain in each of the
17 cases.

18 MR. WEDEEN: Judge, once again, I certainly would
19 agree that we need an order compelling discovery. It's just
20 --

21 THE COURT: What about the deemed admissions?

22 MR. WEDEEN: Well -- I was going to get to that,
23 Your Honor. If you'd like me to address it first, I would
24 request an extension of time.

25 THE COURT: Why didn't you answer -- when were

1 they served?

2 MS. HOCHMUTH: Your Honor, the request for
3 admissions --

4 MR. WEDEEN: July

5 MS. HOCHMUTH: -- were served in July of 2015.

6 THE COURT: Okay. So tell me why you weren't able
7 to respond to them?

8 MR. WEDEEN: Your Honor, I've been trying to
9 communicate with my clients. My clients -- once again,
10 Judge, these investors were effectively reduced in state --
11 financial standing significantly with very limited liquid
12 assets. Getting -- none of them are under the senior
13 citizen age. And I've been trying. I did receive
14 ultimately from the Bernfeld defendants, Judge, that's the
15 Marilyn Bernfeld Trust and Ellen Bernfeld. Literally, a few
16 days ago, I received by e-mail responses to the admission
17 requests. I did meet with Ms. Bernfeld, this Ellen
18 Bernfeld, but they were -- it's not properly formatted. I
19 just didn't have a chance to put them together and I didn't
20 want to send over (indiscernible).

21 THE COURT: What about the Bellinis?

22 MR. WEDEEN: The Bellinis, Judge, I have a meeting
23 scheduled with them early next week. If the Court would
24 indulge me and give me two weeks on the admissions and six
25 weeks on the rest. I mean, I would advise the Court

1 regarding the documents. And so, though we did not produce
2 -- although we did not object, the only documents my clients
3 will have -- they're not sophisticated parties, Judge, or
4 information they received from Madoff that they have no
5 doubt -- no. Now go and retrieve and send back to them -- I
6 mean --

7 THE COURT: The account schedules?

8 MR. WEDEEN: Yeah. That's really all they have.

9 THE COURT: What other documents were you seeking?

10 MS. HOCHMUTH: Your Honor, in the Marilyn Bernfeld
11 Trust, there are seven defendants. And they include a joint
12 venture, two partnerships and trusts. So we are seeking
13 trust documents that will help the trustee to determine if
14 there have been subsequent transfers of these. We would
15 like those. We would like customer statements. Any
16 information regarding organizational structure of these
17 entities. If the requests are deemed admitted, which we
18 believe they are by operation of Federal Rule 36, at that
19 point, we would no longer need to do discovery on the
20 initial transfers because we believe that the receipt of the
21 transfers would be proved as a matter of law.

22 THE COURT: Give me the chronology of when you
23 were reminding counsel that he had not responded to the
24 discovery, and specifically, the request for admissions.

25 MS. HOCHMUTH: Absolutely, Your Honor. If I can

1 point you to the letter that we filed on September 28th --

2 THE COURT: Yeah.

3 MS. HOCHMUTH: -- attached to that letter, we have
4 each of the instances in which we've asked counsel to
5 respond to the requests for admission. Initially, it was
6 the e-mail correspondences regarding disclosures.

7 THE COURT: What about the August 6th letter?

8 MS. HOCHMUTH: I have --

9 THE COURT: Does it remind him --

10 MS. HOCHMUTH: Yes, Your Honor. When we sent the
11 --

12 THE COURT: I see. On June --

13 MS. HOCHMUTH: I have here, Your Honor, when we
14 sent -- we sent the request for admission on July 6th. We
15 communicated with counsel as per the letter regarding an
16 extension of time. We did allow counsel -- we're not taking
17 a hard line stance but we didn't agree to extend --

18 THE COURT: What was the extension to?

19 MS. HOCHMUTH: We extended the time -- counsel
20 asked when the responses were due in August that we extend
21 to the end of September. Because of the fact discovery
22 deadline at that time, we agreed to extend it to September
23 4th. We reminded counsel on September 1st that the
24 responses would be due on the 4th and that we looked forward
25 to receiving them. We never did receive them. I have a

1 letter here, September 1st.

2 THE COURT: I see that.

3 MS. HOCHMUTH: That's the final attempt. And then

4 --

5 THE COURT: I see you always had previously
6 written to me about requesting a conference in this case.

7 MS. HOCHMUTH: Actually, what we did -- in that
8 letter of September 1st, we had taken your ruling in the
9 River Road matter where you had discussed deeming requests
10 for admissions and providing that to counsel as a warning.
11 This is three days before these were due saying Judge
12 Bernstein has just ruled in favor of deeming admissions in a
13 case. If you don't do this, you need to do this. This is
14 three days before they were due. And still with that, Your
15 Honor, he didn't respond.

16 MR. WEDEEN: May I respond?

17 THE COURT: Well, let me just -- I just want to
18 understand the number of times you were warned.

19 MR. WEDEEN: Judge, I --

20 THE COURT: Let me just. I don't think she's
21 done. Go ahead.

22 MS. HOCHMUTH: That would be it, Your Honor, is
23 that we gave counsel plenty of notice, three days before
24 they were due, and despite that, and attached to the
25 (indiscernible) hearing -- order.

1 THE COURT: What's the December 4th letter?

2 MS. HOCHMUTH: I'm sorry, Your Honor, on December
3 4 -- Your Honor, December 4th of 2014, this was just in
4 reference at that time to the initial disclosures that had
5 been due as per the case management notices that were filed
6 in each of the cases at the end of August. At this time we
7 had not served additional discovery.

8 We prefer to be able to get disclosures, so that
9 at that time, we can focus our discovery. But when we
10 didn't get those initial disclosures, we eventually said
11 well, let's move forward with this, let's do our discovery.

12 I guess the problem I have, and the question I
13 have is there's a lot of reminders here that you're late,
14 and all you're telling me is your clients are not
15 sophisticated people, but you haven't told me what you did
16 to try and get the information, assuming that's enough,
17 because you're the agent and they're the principal, and they
18 ultimately have to suffer for failure to comply.

19 MR. WEDEEN: May I respond? First, Judge, counsel
20 was very diligent in reminding me; however, the reason I
21 requested until the least the end of September is I was away
22 for the latter part of August and early September with my
23 family. We then returned from the South Pacific and my
24 daughter had pneumonia.

25 I tried to reason with counsel, and say September

1 3rd is Labor Day weekend, that's really not sufficient
2 between having very observant clients and other things I
3 need some time. The response was September 3rd and was told
4 that was it.

5 I was then forwarded these letter with the order
6 in the Davies (ph) matter, I happen to be acquainted with
7 the attorney, Mr. Abramson in that matter. I took a look at
8 the order, and I don't have it in front of me, Your Honor,
9 but if memory serves me, the order you entered gave an
10 extension of time for the notice -- the admissions. And so
11 I assumed that they were saying this is what we're going to
12 ask for, and the short extension of time in the answering
13 notices to admit seemed fair to me --

14 THE COURT: They told you that they weren't going
15 to do it, right?

16 MR. WEDEEN: Right, Judge. But then they said
17 this is the order, this is what we're going to ask for, and
18 this is what the Judge gave us in the very similar case.
19 And in that particular order, Your Honor extended the time
20 to answer the unanswered admissions, if memory serves.

21 THE COURT: So when did you think that your
22 responses were due?

23 MR. WEDEEN: Judge, I thought it was --

24 THE COURT: You just thought it was an open-ended
25 extension?

1 MR. WEDEEN: No, Your Honor. I thought that I
2 would come in today, having met with some clients, and
3 having gotten two-thirds of them done in the sense that I
4 have the information that I need, that Your Honor would
5 entertain a short extension as Your Honor did in the case
6 that they cited with the order they presented.

7 THE COURT: I don't remember the facts.

8 MR. WEDEEN: But I'm just saying, Your Honor, so
9 when --

10 THE COURT: How long the delay was, I just don't
11 remember that.

12 MR. WEDEEN: And Mr. Davies, I -- for the record,
13 Judge, the defendant in that particular case, developed
14 (indiscernible) is a fairly sophisticated litigant. So they
15 were extended that courtesy, I would request the same for my
16 clients.

17 THE COURT: Again, I don't know what the facts of
18 that case are, but I'm not inclined to extend the date for
19 the request for admissions. Counsel continually reminded
20 you, and I appreciate your telling me that you have
21 difficulty getting information from your clients, but it's
22 -- you know, it's months and months that have gone by and so
23 what I'll do is, I will deem the admissions admitted, I
24 don't even know what they are because I haven't seen them.
25 And the -- I'll enter an order compelling discovery through

1 -- what do you have outstanding, document demands, what
2 else?

3 MS. HOCHMUTH: We have a request for production
4 and interrogatories as well, Your Honor.

5 THE COURT: Answer the interrogatories within 30
6 days, and produce all the documents within 30 days. I don't
7 know if you have enough to move for summary judgment or not,
8 but you can make that determination, based on their request
9 for admission, but it's a fictitious profits case, it's --
10 as I said before, there are strict liability cases unless
11 the law changes.

12 So you can submit an order to -- you can submit an
13 order with a consent, not that you consent to the relief,
14 but you consent that the order accurately reflects the
15 disposition of the conference or if not, just
16 (indiscernible) whatever in notice.

17 MS. HOCHMUTH: Yes, Your Honor.

18 THE COURT: Okay.

19 MS. HOCHMUTH: Thank you very much.

20 MR. WEDEEN: Thank you.

21 THE COURT: Pardon?

22 UNIDENTIFIED: (indiscernible)

23 PHONE OPERATOR: Excuse me, Your Honor.

24 THE COURT: Uh-huh.

25 PHONE OPERATOR: This is the operator, may I

1 disconnect the lines?

2 THE COURT: I'm sorry, I can't -- it's just coming
3 in a little garbled.

4 PHONE OPERATOR: May I disconnect the lines? May
5 I disconnect?

6 THE COURT: Oh, is there anybody on the line in
7 relation to the conference, relating to Picard versus 1096-
8 1100 River Road Associates?

9 PHONE OPERATOR: No, Your Honor, there's no one on
10 the line.

11 THE COURT: Then you can disconnect the line,
12 thank you.

13 PHONE OPERATOR: Then have a good day, bye-bye.

14 THE COURT: All right. Go ahead.

15 MS. OZTURK: Good morning, Your Honor, my name is
16 Ferve Ozturk and I represent the Trustee in the Picard v
17 1096-1100 River Road Associates case.

18 I'm here before you today to request similar
19 relief to my colleague in the Bernfeld case. We're
20 requesting permission to file a motion to deem the matters
21 and the Trustee's request for admissions to the defendants
22 admitted.

23 THE COURT: You know, all I got was the
24 admissions, I didn't see what the questions were, what the
25 requests were.

1 MS. OZTURK: I can hand over a copy of the --

2 THE COURT: So in order to determine whether or
3 not the response is reasonable, I'd have to take a look at
4 the questions.

5 MS. OZTURK: Certainly. Would you like our copy
6 of those now?

7 THE COURT: I'll take them now, but have you
8 received any response to your letter?

9 MS. OZTURK: No. We've received no response.
10 May I approach the bench?

11 THE COURT: Is there anyone here today on 1096-
12 1100 River Road Associates, representing the defendants?

13 (No response)

14 THE COURT: The record should reflect there's no
15 response. Did anybody say they were coming?

16 MS. OZTURK: No. Mr. Abramson's associate told me
17 that this date was fine for Mr. Abramson.

18 So, Judge, you'll see there's three sets of
19 requests for admissions. We served one on each of the
20 defendants. We received only one response. It's unclear
21 which defendant is responding to which request for
22 admission.

23 THE COURT: Don't they have to be signed by
24 somebody?

25 MS. OZTURK: No, we -- they --

1 THE COURT: It's signed by the attorney, but he
2 doesn't say who he's signing it for?

3 MS. OZTURK: No. He represents that he's the
4 attorney for a friend Davies (ph) apparently is the
5 individual, but there's no signature from the defendant,
6 Parhe (ph).

7 THE COURT: Who represents 1096-1100 River Road?

8 MS. OZTURK: Mr. Abramson has appeared as attorney
9 of counsel for all the three defendants, 1096 River Road,
10 Fred Davies LLC.

11 THE COURT: Let me ask you this, and I asked in
12 the last case, are the admissions sufficient to make a
13 motion for summary judgment? This is a fictitious profits
14 case?

15 MS. OZTURK: Yes, it's a good faith fictitious
16 profits case, and yes, the admissions are sufficient to --

17 THE COURT: Why don't you do this, and really, I
18 mean, you can do this with all the cases. Make a motion for
19 summary judgment, based on the admissions and whatever else
20 you have obviously, and let them come in and explain why the
21 admission shouldn't be deemed admissions. I'm just a little
22 uncomfortable to deal with this with nobody here, and not
23 having reviewed the questions, and you know, next time it
24 would be helpful, if you write me one of these letters, to
25 send me the discovery as to which things no response or the

1 case of this one, send me the requests, so I can read
2 together. Usually they repeat the requests, and then they
3 put in the answer, but they didn't do it in this case.

4 MS. OZTURK: Certainly. In this case, there is
5 only one response, it's not clear which defendant is
6 responding.

7 THE COURT: Well, if I assume it's a response for
8 all the defendants, you're still saying it's insufficient,
9 right?

10 MS. OZTURK: Yes, that it's insufficient under
11 Rule 36.

12 THE COURT: I'm looking at some of these requests,
13 and they're pretty specific in terms of the amount of money
14 that was withdrawn.

15 MS. OZTURK: The request for admissions asks for
16 admissions concerning the trustee's -- you know, the first
17 (indiscernible) the trustee's exhibit to the complaint,
18 which sets out the amount of the transfers --

19 THE COURT: Right.

20 MS. OZTURK: -- deposits and withdrawals. And you
21 know as for Mr. Davies himself, we allege he's a subsequent
22 transferee and we ask in our admissions that he received
23 subsequent transfers.

24 THE COURT: Yeah, you know, on second thought, I'm
25 looking through these request for admissions. They're very

1 specific and they're not key to the account statements.
2 They're key, which they're claiming are bogus, they are key
3 to the schedules that the trustee has prepared, and one
4 would think that an investor would know how much money they
5 put in and how much they put out. Or if they weren't, at
6 least be in a position to say, look, I no longer have my
7 personal records and I can't answer these questions, which
8 is not what the substance of the responses are. Simply the
9 responses are all the same, that the account statements are
10 bogus, but the request doesn't go to the account statements,
11 they go to the schedulings that the trustee has prepared,
12 and just specifically ask him, admit that you took it, put
13 in this much or admit that you took out this much.

14 So on second thought I will deem these admissions
15 -- the responses are wholly insufficient in light of the
16 request and based upon the insufficiency of the responses,
17 and also based upon the failure to even appear at this
18 conference to defend the responses, I'll deem the admissions
19 (indiscernible). You can submit an order on that.

20 MS. OZTURK: Thank you, Your Honor.

21 THE COURT: All right.

22 MS. OZTURK: We're also seeking sanctions. You'll
23 recall the last time we were here before the Court, the
24 Court entered an order compelling discovery. Defendants
25 violated that order. They were directed by this Court to

1 serve initial disclosures on September 4th and responses to
2 the trustee's interrogatories, request for admissions, and
3 document requests on September 18.

4 On September 18, we received the one set of
5 insufficient responses to our RFAs and nothing else. We
6 haven't had any communication with the counsel since then.

7 Your Honor put --

8 THE COURT: What kind of sanctions are you
9 seeking?

10 MS. OZTURK: We're seeking two types of sanctions.
11 First, we would ask for an order precluding the defendants
12 from introducing any documents or witnesses to controvert
13 the trustee's claims at the summary judgment stage. We
14 believe that that order would be supported by the rules.
15 There's several grounds for that.

16 THE COURT: Where do you ask for that in your
17 letter? I just see a general request for sanctions under
18 37(b)(2)(A), sanctions against the defendants for failure to
19 comply with discovery order and that provision you cite as a
20 host of sanctions.

21 MS. OZTURK: That's right, Your Honor. You know,
22 we're ready to proceed today here as a conference and then
23 bring a motion setting out the --

24 THE COURT: You can make a motion for sanctions.
25 Why don't you make a motion for summary judgment and see

1 what occurs as a possibility, I'm not suggesting you have to
2 do that, let's just see why the defendants aren't doing very
3 much to defend this case anyway.

4 MS. OZTURK: Right. The --

5 THE COURT: You're free to make a motion to compel
6 discovery, I just wouldn't strike the answer, or preclude
7 anything in response to the letter, which is not even
8 clearly requested.

9 MS. OZTURK: Understood, Your Honor. We're also
10 seeking attorney's fees and expenses.

11 THE COURT: Same motion, it's a form of sanctions,
12 it's the same motion. If you want to make a motion to
13 compel discovery and seek or rather to seek sanctions under
14 Rule 37, make a motion, but just make clear what it is
15 you're seeking.

16 MS. OZTURK: Okay. That's understood.

17 THE COURT: And obviously the basis for it.

18 MS. OZTURK: Okay.

19 THE COURT: All right.

20 MS. OZTURK: I can argue it here, but.

21 THE COURT: I'm not going to do it in response to
22 a letter. That's a little different from simply asking for
23 (indiscernible) admissions which is what the rule says
24 anyway.

25 MS. OZTURK: Certainly.

1 THE COURT: That's it.

2 MS. OZTURK: Thank you, Your Honor.

3 THE COURT: Thank you. You can submit an order on
4 the other one. Actually, no, settle an order on your
5 adversary.

6 All right. Thank you very much.

7 MS. OZTURK: Thank you, Your Honor.

8 (Proceedings concluded at 12:26 PM)

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CERTIFICATE

I, Sherri L. Breach, certify that the foregoing transcript
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**Sherri L
Breach**

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DATE: October 30, 2015

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